90-945

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FREDERICK LAWRENCE WHITE, JR., BENJAMIN L. STAPONSKI, JR., AND GWEN G. CARANCHINI,
PETITIONERS

v.

GENERAL MOTORS CORPORATION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Gwen G. Caranchini
3101 Broadway, Ste. 420
Kansas City, Missouri 64111
(816) 931-2800

ATTORNEYS FOR PETITIONERS WHITE AND STAPONSKI, AND PRO SE

QUESTIONS PRESENTED

1. When employees claim documents signed by them without the advice of counsel bar suit against their former employer under Title VII, ADEA and other federal and state statutory and common law employment laws, can the issues of economic duress, ambiguity or unconscionability be determined on summary judgment or are these issues for a jury?

2. Whether a court after finding there are insufficient facts to submit a claim to the jury under Rule 56, should use that conclusion to support its subsequent finding that a Rule 11 violation has occurred?

3. Whether Rule 11 was intended to be used to impose sanctions where colorable theories exist, but the court disapproves of the manner in which the case was pled?

4. Whether the court when it imposes monetary sanctions under Rule 11 for the entire cost of the litigation violates the "American Rule" against fee shifting?

LIST OF THE PARTIES

The parties to the proceedings below were Petitioners Frederick Lawrence White, Jr. and Benjamin L. Staponski, Jr., plaintiffs and sanction debtors below; Gwen G. Caranchini, sanction debtor and counsel for White and Staponski, as well as pro se; and General Motors Corporation, Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FREDERICK LAWRENCE WHITE, JR., BENJAMIN L. STAPONSKI, JR., AND GWEN G. CARANCHINI,
PETITIONERS

v.

GENERAL MOTORS CORPORATION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Frederick L. White, Jr., Benjamin L. Staponski, Jr., and Gwen G. Caranchini, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 27, 1990.

OPINIONS BELOW

The opinion of the United States District Court of Kansas in granting Summary Judgment is reprinted in the Appendix hereto, pp. I-1-

I-18, infra.; the opinion of the United States District Court of Kansas in granting Sanctions is reprinted in the Appendix hereto, pp. H-1 - H-17, infra.; the opinion of the United States District Court of Kansas in granting an award of attorneys fees is reprinted in the Appendix hereto, pp. G-1-G-10, infra.; the opinion of the Court of Appeals for the Tenth Circuit regarding the grant of Summary Judgment by the District Court is reprinted in the Appendix hereto, pp. E-1 - E-26, infra.; the opinion of the Court of Appeals for the Tenth Circuit regarding the grant of sanctions and the amount of sanctions granted is reprinted in the Appendix hereto, pp. F-1 - F-44, infra.; the Order of the Court of Appeals denying Petitioners' Request for Rehearing and Suggestion for Rehearing en Banc with regard to the issue of summary judgment is reprinted in the Appendix hereto, pp. D-1 - D-2, infra.; the Order of the Court of Appeals

denying Petitioners' Request for Rehearing and Suggestion for Rehearing en Banc with regard to the issue of sanctions is reprinted in the Appendix hereto, pp. C-1 - C-2, infra.; the Order of the Court of Appeals denying Petitioners' Motion for Leave to File Addendum to their Request for Rehearing and Suggestion for Rehearing en Banc with regard to the issue of release is reprinted in the Appendix hereto, pp. B-1 - B-2, infra.; the Order of the Court of Appeals denying Petitioners' Request for Stay of the Mandate with regard to the issue of sanctions is reprinted in the Appendix hereto, pp. A-1-A-2, infra.

JURISDICTION

Petitioners White and Staporski seek review of the Order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing en Banc on the issue of Summary Judgment, entered August 27, 1990; Petitioners White, Staponski and Caranchini

seek review of the Order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing en Banc on the issue of Sanctions, entered August 27, 1990.

The jurisdiction of the Court to review the Judgments of the Tenth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS

Text of Rule 56

Summary Judgment

(a) * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability

alone although there is a genuine issue as to the amount of damages.

* * *

Text of Rule 11

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall

impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below

Caranchini[1] filed a Complaint against General Motors (hereinafter referred to as GM) for White and Staponski based upon diversity of citizenship on February 2, 1988\[2]. The Complaint alleged two counts for wrongful discharge under Kansas common law--one based upon White and Staponski's whistleblowing to GM management about leaky brakes in the plant; one based on breach of an implied contract of employment for White and Staponski; and a third count for White

---

[1] Caranchini has never been a member of the Bar of Kansas. She retained local counsel, Linda Scott Skinner, who co signed the pleadings, but did not actively participate in the case management.

[2] Until otherwise noted, all documents will refer only to the month and date in 1988.

for libel and slander for statements made by GM to a potential employer of White after his discharge. No statutory claims for wrongful discharge were pled as none were deemed applicable.[3]

No count was pled to set aside the releases, although the Complaint pled White and Staponski had been "forced into the buyout".

The Complaint was accompanied by a First Request for Production of Documents, a First Set of Interrogatories, a First Request for Admissions and a Notice to take the Depositions of Timothy Danahy, the Personnel Director, and James Schmer, the Salary Administrator, for the Fairfax plant. The Interrogatories and Request for Production of Documents requested, among other items, identification and production of all

---

[3] White and Staponski are white males; Staponski was less than 40 at the time of signing and White only two months past his 40th birthday.

documents signed at the time of discharge.

No Answer was ever filed by GM. On March 9 GM filed a Motion to Dismiss and for Summary Judgment[4] attaching copies of the purported "releases" signed by White and Staponski with accompanying affidavits from Danahy and Schmer to the effect that the "releases" were signed in their respective presences. GM raised two issues: first, that because White and Staponski had signed the "releases" their claims raised in the Complaint were barred; and second, White and Staponski must move to set aside the "releases" prior to proceeding with their wrongful discharge claims.[5]

---

[4] GM never denied there were brake leaks in the Fairfax plant in 1986, nor that White and Staponski complained about the problem, nor that they were chosen for SISP because of their complaints. Rather GM contended the problem was resolved in 1986 and that White and Staponski signed the releases and therefore these are not issues.

[5] GM relied on a decision, at the time still pending on appeal, by the District Court of Kansas (Judge O'Connor) to the effect that the release must be set aside

Caranchini filed a Notice to take the depositions of Westlake Hardware employees regarding White's libel/slander, Count III, on March 10. GM on March 11 filed a Motion for Protective Order seeking to limit any discovery or limit discovery to release issues. On March 17, after a discovery conference by telephone with the Magistrate, discovery was allowed on the issue of "release", but not on the remaining issues, pending further briefing. Caranchini agreed to a stay of discovery on non release items, (with the exception of discovery on the libel/slander count) in Suggestions in Opposition to Defendant's Motion for Protective Order filed April 7.

On April 27 Caranchini filed suggestions

---

prior to the suit being brought on the underlying claims. The case was reversed on appeal in the fall of 1989 in an unpublished decision of the Tenth Circuit. Rickman v. Cone Mills Corporation; D.C. No. 85-2432, Court of Appeals No. 87-1830. (No sanctions were sought or granted for the bringing of that suit.)

in opposition to GM's Motion to Dismiss and for Summary Judgment with a supplemental appendix.[6] In response to the affirmative defense of "release", Caranchini raised that the "releases" were signed under duress, were vague, ambiguous, unconscionable and fraudulent. Caranchini also claimed there was no Kansas state law which required that the "releases" be set aside before suit was brought on the underlying claim.

Caranchini filed a Motion for Partial Summary Judgment on some issues of the release and on parts of Counts I (for whistleblowing)[7] and Count II (breach of

---

[6] The appendix included the affidavits of many persons who were similarly presented with the SISP documents whose stories were nearly identical; that is, alleging lack of knowledge of what they were signing, coercion, economic duress and desire for more time.

[7] The appendix supporting the Motion for Summary Judgment contained the affidavits of numerous engineers, supervisors, hourly individuals and the Fairfax Director of Quality Control (White's father) who attested to the continuing nature of the problem and the complaints of White and Staponski who had

implied contract) on May 27 as well as Suggestions in Support thereof. Other than GM responding to the limited discovery requests regarding discharge, depositions of White, Staponski, Danahy and Schmer on the issue of "release," no discovery regarding any other matter raised in the Complaint proceeded until GM's Motion for Protective Order regarding discovery on non release issues was denied by the Magistrate on June 1. The Magistrate also ordered discovery to commence immediately and be completed by December 1.

GM filed a Motion To Review the Magistrate's Order on June 13 to which Caranchini replied June 14. GM orally requested the Magistrate on June 14, without objection by Caranchini, for a stay on discovery until the Order was reviewed. The Magistrate on June 16 ordered GM to locate and safekeep all documents requested. On June 24, Judge Saffels denied GM's request

---

initiated the complaints on the brake problem.

for review of the Magistrate's order.

GM then filed on July 5 a Motion for Protective Order requesting Caranchini, White and Staponski be precluded from using any confidential documents or information obtained in discovery for purposes other than the instant litigation. Again, Caranchini agreed to an interim protective order pending resolution of the latest Motion for Protective Order. That Motion was never ruled.

During the months of July, August and September, discovery proceeded, although limited by Caranchini having surgery. On September 1, Caranchini filed a motion to amend Count I (whistleblower claim) of the Complaint to make the claim consistent with a recent Kansas Supreme Court decision.

On September 30, Judge Saffels granted GM's Motion for Summary Judgment and denied as moot GM's Motion for Separate Trial on the issue of release; White and Staponski's

Motions for Partial Summary Judgment; and for Leave to Amend Count I. Judgment, including costs, was entered that same date (Appendix I).

On October 26, Caranchini filed a notice of appeal from the September 30 Crder. On October 31, GM filed its Motion for Sanctions seeking sanctions against Caranchini, White and Staponski, but not local counsel Skinner, for the entire cost of defending the lawsuit, on the grounds there was a lack of investigation and legal basis for the claims made.

On December 1 an evidentiary hearing[8] was had before the Honorable D. Brook Bartlett, United States District Judge in the Western District of Missouri, in Perkins v. General Motors which was being tried to the court on a Title VII claim for sexual harassment of a

---

[8] The question presented was whether certain testimony of White, Sr. would be permitted in the trial of Perkins v. General Motors.

woman supervisor. Paul Scott Kelly, (hereinafter referred to as Kelly), lead counsel in Perkins as well as White) testified upon questioning by his partner, that White, Jr. was obviously very upset over being "forced to take the buy out and he was intending on suing GM".

Caranchini also requested the Tenth Circuit refer the issues presented on the issue of whether the releases should be voided on the grounds of duress, ambiguity, and unconscionability to the Kansas Supreme Court. Such referral was not made, and no order entered regarding said denial.

Caranchini, White and Staponski's response to GM's Motion for Sanctions was filed January 17, 1989\[9], and GM replied January 27. On April 10 the Motion for Sanctions was granted (Appendix H). On April 11, Caranchini, without knowledge of

---

[9] All references to dates will be presumed to be filed in 1989 unless reference is made otherwise.

the April 10 order, filed a Motion for Remand of the case in chief based upon the statement of Kelly in Perkins. GM opposed the Motion and sought sanctions for its filing. On April 24, GM filed its Application for Attorneys' Fees seeking in excess of $172,000 for the entire cost of defense. On May 15, Caranchini, White and Staponski filed their Motion to Strike GM's Application for Attorneys' Fees, Motion for Discovery regarding the reasonableness of GM's requested attorneys' fees, and a Request for Hearing on the application for attorneys' fees. On May 19, Caranchini, White and Staponski filed a response to GM's additional Motion for Sanctions regarding the filing of the Motion for Remand.

On June 30, Judge Saffels granted GM's entire Request for Attorneys Fees in the amount of $172,382.19; denied Caranchini, White and Staponski's Motion to Strike, Motion for Discovery and Request for hearing

on the sanctions, and also denied GM's Supplemental Motion for Sanctions for Caranchini, White and Staponski's filing the Motion for Remand, as well as denying the Motion for Remand itself (Appendix G).

On July 6, Caranchini appealed on behalf of White and Staponski from the June 30 Order. On July 21, Caranchini appealed on behalf of herself as well as White and Staponski from the April 10 order granting the sanctions as well as the June 30 order awarding attorneys' fees. Separate briefing on the two appeals (one from the Order granting Summary Judgment, hereinafter referred to as "White I", No. 88-2684, and one from the order granting sanctions and awarding attorneys' fees, hereinafter referred to as "White II", No. 89-3159 and 89-3182) proceeded. No bond was posted by White, Staponski and Caranchini for the judgment entry of sanctions. Garnishment of Caranchini and Staponski commenced

January 12, 1990\[10] after debtor examinations of White, Staponski and Caranchini that date. Oral argument on White I and White II occurred January 19 and the case was thereafter submitted.

On July 19\[11] the Tenth Circuit affirmed the grant of summary judgment and denied sanctions for the filing of the appeal (Appendix E). In a separate opinion that same day, it affirmed the grant of sanctions, affirmed the denial of the Motion for Remand, but vacated the award of sanctions, remanding for further proceedings on the amount of sanctions to be awarded against Caranchini, White, Staponski and Skinner.[12] (Appendix F).

---

[10] Hereinafter only the month and date will be stated but all dates are 1990.

[11] The Opinions were corrected for typographical errors on July 23, 1990 but the substance of the opinions were not changed by this amendment.

[12] The Court gave little explanation as to why Skinner, who GM had not requested be sanctioned, and the District Court did not sanction, should be considered for apportionment of sanctions upon remand.

White, Staponski and Caranchini thereafter filed Petitions for Rehearing and Suggestions for Rehearing en Banc in both cases based upon inconsistencies between the two opinions, which were denied August 27 (Appendices C and D). Prior to the orders denying Rehearing en Banc, White and Staponski filed a Motion seeking leave to file an Addendum to their Petition for Rehearing on the Summary Judgment case based upon a case decided the day after White I by the Tenth Circuit. This Motion was denied by the Court on September 7 (Appendix B).

Caranchini, White and Staponski filed their Request for Stay of the Mandate on the rehearing of the sanction matter September 1 which was thereafter denied by the Court on September 13 (Appendix A). No hearing has been scheduled pursuant to the Tenth Circuit's Order of Remand of July 19.

B. Statement of Facts

In the spring of 1986 White and

Staponski, first line supervisors involved with brake assembly at the old Fairfax assembly plant in Kansas City, Kansas, began to notice brake leak problems on the line which could not be corrected. They repeatedly brought this problem to the attention of upper GM management at the plant and Detroit. White and Staponski believed GM was refusing to follow Motor Vehicle Safety Standards with regard to faulty brakes and was continuing to ship cars to the public with serious brake problems which could result in total failure of the brake system without any forewarning. This belief was supported by others in the plant, including engineers. White and Staponski were told by upper GM management that their complaints could force a recall which would shut the plant down and possibly force a recall of other cars GM was then producing. Upper Fairfax management thereafter told White and Staponski that if they continued in their

complaints they could be fired.

In August 1986, GM announced the Special Incentive Separation Program ("SISP") as part of a corporate-wide program to reduce salaried personnel through attrition and voluntary separation. The initial purpose of SISP was to encourage voluntary separations of employment in exchange for a substantial lump-sum payment, continuation of certain insurance benefits, and the availability of career counseling. This program was "offered" to certain "targeted" employees and was referred to as the "buyout".

By May 1987 it became apparent to upper Fairfax management that the "voluntary" SISP program had not met the target reduction of 25 percent of the salaried workforce. Thereafter, if an employee did not accept SISP (if offered) and did not have return rights to a bargaining unit he would allegedly remain on salary in some unknown capacity for an undetermined length of time.

According to Schmer, the Fairfax Salary Administrator for White and Staponski, all the "buy-outs" up until May 1, 1987 had been voluntary--the clear inference being that those after May 1, 1987 were not "voluntary".

On May 12, 1987 White was told to report to Ruppelius, Superintendent of the Chassis Department. Ruppelius told White he did not have a job at GM in any capacity and that the decision was "just made" and Schmer would provide further explanation. Subsequent to that meeting with Ruppelius, Schmer told White that due to the problems White had in confronting upper management there was no job for him in the new plant or anywhere in GM. Schmer told White he had to decide whether he wanted to take the buyout program or be fired as of June 1, 1987. White had two weeks to make the decision. Schmer then terminated the interview.

Also on May 12 Ruppelius told Staponski he would have no position in the new plant or

anywhere in GM. In a subsequent interview with Staponski, Danahy told him he had no alternative to accepting the buyout. He had two weeks to accept the buyout or be fired. Danahy then terminated the interview.

At the conclusion of their interviews with Schmer and Danahy, White and Staponski were each separately presented by Schmer and Danahy Special Separation Incentive Worksheet Estimates, Incentive Separation Information and other general information. They were told to report to the GM Training Center May 14 for a training class through the Mainstream Corporation (hereinafter referred to as Mainstream) and to bring with them the packets of papers they had just received.

Neither GM nor Mainstream ever explained to White or Staponski their rights under the Consolidated Omnibus Reconciliation Act (hereinafter referred to as COBRA). During the Mainstream class with other GM supervisors targeted for the buyout, White

and Staponski were informed in general terms about SISP, but also specifically that an "Entrepreneur Class" would be made available to them at GM's expense should they sign the buyout papers. GM promised to pay White and Staponski a lump sum amount for the time they had worked for it and certain other benefits through December 31, 1987. However, from conversations with other targeted supervisors, it was clear that different supervisors were getting different stories about SISP benefits. GM representatives refused to meet and discuss the terms of SISP with the group as a whole.

A few days before the deadline to sign, White and Staponski spoke with an attorney who told them he needed additional time to review the paperwork in order to furnish legal advice. White on behalf of himself and Staponski then requested GM give he and Staponski additional time to obtain legal advice, which request was refused.

On May 28 Schmer again told White he had a choice between taking the buyout or being fired. At the point White started to sign, Schmer did elude to another "choice"--if White did not sign the papers, he would be given a job he could not do and instructions he could not follow and would be fired anyway. In a separate meeting with Staponski that same day, Schmer told Staponski the same thing.

The documents signed May 28, 1987 by White and Staponski were entitled "Statement of Acceptance of Special Incentive Separation" and were not denominated as "releases". It did not recite with any specificity what White or Staponski would receive as consideration for signing. None of the terms were subject to bargaining by White and Staponski--it was a "take it or be fired" offer. Neither White nor Staponski were given copies of the documents they signed.

White did not receive all the promised

insurance coverage; White and Staponski were told they would have to pay their own way to the "entrepreneur class" in Detroit; however, each did receive the lump sum payment, which included monies already due them under GM programs.

White and Staponski believed termination could only be for "just cause". "Just cause", according to White and Staponski, did not include being terminated because they complained to management about GM violations of the Motor Vehicle Safety Standards.

At the time of the signing, neither White nor Staponski had any job prospects. Staponski had a high school education, and White had some college. They both expected to retire from GM as their fathers before them. White had a sick child and sick wife who needed insurance coverage.

After his separation from GM, White believed GM told a representative of Westlake Hardware, a potential employer, (before he

filed lawsuit), he was a troublemaker and had filed a lawsuit against GM. The Westlake individual to whom White spoke denies calling GM for a reference on White; however, no one other than the one employee with whom White spoke gave an affidavit to the effect they did not receive a bad reference from GM or that they told the Westlake employee who spoke to White that GM had given White a bad employment reference.

REASONS FOR GRANTING WRIT

1. When employees claim documents signed by them without the advice of counsel bar suit against their former employer under Title VII, ADEA and other federal and state statutory and common law employment laws, can the issues of economic duress, ambiguity or unconscionability be determined on summary judgment or are these issues for a jury?

Increasingly during reductions in work force, employees are presented by their employers with boiler plate forms, sometimes denominated as "releases", sometimes not, which in exchange for a lump sum payment which may or may not include sums to which the employee is already entitled, release the

employer from liability under state and federal statutes and commonlaw employment laws. The employees reduced out often claim to fall in protected groups (race, age, sex, handicap), are whistleblowers or may be protected by "implied contracts of employment". The employee usually has limited if any knowledge of his rights, is not protected by a collective bargaining agreement (CBA) and has insufficient time to consult with an attorney to obtain legal advice. After the employee signs, he has second thoughts and brings the document to an attorney who attempts to go forward with the underlying claim. The employer is most frequently a large corporation, and suit, if not based upon a federal question (Title VII, ADEA or the Handicap Act), can be based upon diversity, thereby making the case removable to federal district court. The issue immediately raised by the employer by a Rule 56 Motion is whether the document the

employer claims to be a "release" bars the employee's federal and state claim(s).

The key issue on summary judgment is whether the issues of voluntariness, unconscionability, fraud or ambiguity regarding the signing of the "releases" and their content is one that can be determined on summary judgment or whether one or more of these issues must be submitted to a jury for consideration. Not surprisingly, the employee argues for submission to the jury, while the employer argues there are sufficient "facts" for a court to make the determination. Despite the ruling in Anderson v. Liberty Lobby, Inc., 466 U.S. 242, 255 (1986) that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . .", which received further support in the recent case of Lytle v. Household Mfg., Inc., 110 S.Ct. 1331 (1990), employers

continue to all too often successfully assert before district and appellate courts that a court under Rule 56 may make such determinations with regard to the issues of voluntariness in the signing of the releases, and whether the releases themselves are vague, ambiguous or unconscionable, even though such determinations almost universally involve the jury functions of "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts".

As we enter a time of economic downturn, when such reductions in work force will increasingly be utilized by corporations seeking to cut costs and avoid lawsuits raising statutory and commonlaw claims for wrongful discharge, this issue will increasingly be presented to district and appellate courts under Rule 56. For these reasons this court should give guidance to the lower courts on the appropriate

application of Rule 56 to the following increasingly common factual scenarics:

This case involves one of this country's largest corporations, who utilized a boiler plate form to wring from numerous[13] non-CBA employees a "release" of any claims they might have under federal or state statutes or common law for employment rights, in exchange for money and benefits (some of which the employee unknowingly was already entitled). Additionally, here the employees and their counsel were sanctioned (initially for the entire cost of the litigation) for bringing such a suit! The case therefore has wide impact, not only on GM employees (who continue to be subject to reductions in force) but other non CBA employees in large corporations who will be subject to

---

[13] Although other non CBA employees at Fairfax considered filing suit, when this claim was dismissed and sanctions imposed against Caranchini, White and Staponski prior to the expiration of the statute of limitations on their claims, they did not proceed with suit.

reductions in force.

The District and Appellate Courts, while relying in their opinions on Kansas state law as set forth in Hastain v. Greenbaum, 205 Kan. 472, 470 P.2d 741, 746 (1970) for the proposition that whether facts as alleged by a party are sufficient to constitute duress is a question of law, disregarded the holdings of Lytle and Anderson that credibility findings, weighing the evidence and the drawing of inferences from the facts should be construed in favor of the party claiming the duress, not in the moving party's favor. Rather, both the District and Appellate courts weighed the facts, assessed credibility and drew inferences from the facts in favor of the movant GM and against the nonmovants White and Staponski; and based upon the courts' assessment of credibility, the courts' weighing of the evidence and the courts' inferences, found its conclusions to be "facts" which were then found to be

insufficient as a matter of law[14] under Rule 56 and Hastain to go to the jury. Based upon the same analysis, the lower courts found the "releases" were not unconscionable because White and Staponski allegedly

---

[14] (Appendix E-11 - E-13):
"White and Staponski contend that the releases they signed are ineffective due to fraud, ambiguity, and duress. We disagree. . . . There is no evidence that GM misrepresented or withheld any information necessary to the plaintiffs' decision making. The district court properly granted summary judgment on this issue.

* * * White and Staponski, despite reciting a laundry list of alleged ambiguities in the releases, do not assert any confusion or disagreement between the parties regarding the terms of SISP. Plaintiffs were given two weeks to consider GM's offer. They had the opportunity to talk to an attorney; they contacted personnel at GM to ask questions; they attended one of the career training sessions offered by GM and talked about the proposal with other offerees. We think that Kansas would adopt the view that the fourteen day consideration period was reasonable and noncoercive.

(Appendix E-15 - E-16)
* * * It is undisputed that plaintiffs in the instant case took two weeks off with pay to consider the offer, during which time they consulted with each other, with GM officials, with other offerees, and with an attorney."

received certain consideration[15]. District and Appellate courts should not construe Hastain and other like state statutes in conjunction with F.R.Civ. P. 56 as a means of circumventing jury trials where issues of credibility, inference drawing and weighing of the evidence remain, under the Seventh Amendment, the sole provence of a jury.

The factual scenario presented is not unique, out of the ordinary or uncommon. It is egregious. As shown below, the lower courts' findings are clearly erroneous because they invaded the province of the jury by making credibility determinations, weighing the evidence, and drawing inferences from the facts.

The Appellate Court found for purposes of

---

[15] (Appendix E-17)
* * * Without repeating previous discussion, we observe that plaintiffs were given ample time and opportunity to consider the offer. They were paid a substantial sum of money ($54,869.99 to White, $66,136.40 to Staponski), were provided with continuing medical insurance coverage; and were offered training courses to facilitate their career change.

summary judgment "that plaintiffs were threatened with termination because of their whistleblowing activities."[16] This is a wrongful act and as such constitutes duress under the Restatement of Contracts, expressly adopted by the Kansas Supreme Court in Vandive v. Vandive, 171 Kan. 626, 237 P.2d 244 (1951) and cited with approval in Hastain, supra. Although finding a wrongful threat was directed at White and Staponski, the Appellate court found:[17]

> ". . ., where the party had and took an opportunity for reflection and for making up his mind and where he consulted with others and had the benefit of their advice, especially where he was advised by his counsel"[18]

there is no duress. Such conclusions are either directly contrary to the record or

---

[16] Appendix E-9 - E-10, FN 3)

[17] Appendix E-15

[18] There is no evidence that White and Staponski received "advice of counsel," only unrebutted evidence that they needed time, which was denied them by GM, to obtain advice from counsel.

other inferences more favorable to White and Staponski can be drawn from the following excerpts from the record:[19]

White's affidavit opposing GM's Motion for Summary Judgment clearly shows White did not have an opportunity to CONFER and obtain advice from counsel and that such opportunity was specifically denied him by GM:

> "Mr. Staponski and I met with an attorney a few days before returning to the plant to meet with Mr. Schmer. . . The lawyer told us that he needed additional time to review the paperwork and to advise us. Mr. Staponski and I then decided to request additional time . . .so that we might be able to fully explore the legal ramifications of what GM had presented to us. . . . I called Mr. Schmer and asked if we could have a few days more . . .because we desired to consult with an attorney. . . Mr. Schmer would not permit us to postpone our return to the plant in order . . . to contact an attorney."

Staponski concurs with this statement:

> "Q. Did you ask Mr. Danahy or attempt to ask Mr. Danahy or Mr. Schmer

---

[19] Excerpted from the Appendix submitted with plaintiffs-appellants' suggestions in opposition to GM's Motion for Summary Judgment in the District Court and part of the record on appeal.

for an extension of time to try to contact another lawyer?

A. Fred phoned Jim Schmer and asked him if we could put it off down the road a couple of days.

Q. And what were you told by Fred that Mr. Schmer told him?

A. Fred said that we had to be in the office and sign the papers on the 28th."

Despite the conclusion of the Appellate court that there was no ambiguity in the release language, the only recitation to the nature of the consideration in the release is:

> "In consideration of the terms of the special incentive separation offer, including the provision for six months from the date of separation of basic life insurance and health care coverage (excluding dental, vision and CMEIP) and the availability of career counseling, I hereby release . . . "

The purported releases do not even state the amount of money White and Staponski were to receive. Nor do the releases specify what portion of the monies or other consideration proffered White and Staponski were already entitled to pursuant to COBRA or their retirement plans. Where the terms of a

release in an employment situation lack clarity because there is a lack of recitation of the entire consideration to be furnished, it is for a jury to determine contractual intent and what the terms of the contract are in a given situation, Oglesby v. Coca-Cola Bottling Co. of Chicago/Wis., 620 F. Supp. 1336, 1343 (D.C. Ill. 1985).

Additionally, the evidence was clear that not only White and Staponski, but other offerees, were confused as to the nature of the consideration because of conflicting information received from GM:

White did not understand what he was releasing:

> "Q. Well, take a look at page 3 of Ex. 11, . . .and I quote "I hereby release and forever discharge General Motors and its officers, directors and employees from all claims, demands, and cause of action known or unknown which I may have based on the cessation of my employment at General Motors." Do you understand that?
>
> A. I don't know, sir. I didn't understand it to be that."

White was confused about what the terms

were because everyone was getting different stories about the buyout:

> "Q. What other options were given the other people?
> A. Well, there was about 18 to 28 people . . . and we had about 20 different stories. It was obvious that no one had really talked to the same person. In that meeting we requested as a group for Mr. Allen (Mainstream Corporation) to contact Mr. Danahy and Mr. Schmer and come up and answer our questions as a group and get specific answers because none of us had the same story."

White did not know he was entitled under COBRA to have a continuation of his insurance benefits that he had at GM at his own cost:

> "No General Motors or Mainstream employee explained to me my rights under COBRA, that general Motors had to provide me with insurance conversion rates even if they discharged me after June 1, 1987 at any time."

White believed unless he signed the buyout he would have no insurance coverage for upcoming surgeries on his wife and child:

> "Q. Was it your understanding at the time you signed the statement of acceptance if you were fired you would not have any insurance coverage at all?
> A. Correct.
> Q. And no right to continue coverage at your own expense?

A. Correct.
Q. And what do you base that understanding on?
A. What Mr. Schmer told me."

Staponski believed this to be the case for himself as well because:

"White, Jr. told me after he met with Schmer, that Schmer told him that he would have no salary insurance benefits at all after June 1, 1987 unless we signed the buyout papers by that date. I heard nothing at the Mainstream classes to contradict that statement made by Schmer to White, Jr.

No GM or Mainstream employee explained to me my right under . . . COBRA, i.e. that GM had to provide me with insurance conversion rates even if they discharged me after June 1, 1987 at any time."

Danahy did not explain to Staponski that part of the monies Staponski was receiving were already due him under his retirement plan:

"Q. Did you explain to Mr. Staponski, that part of the numbers, or the amount of money which is indicated on this sheet was money that was coming to him anyway?
A. No."

Other offerees confirm White and Staponski's confusion regarding what exactly

they were getting from SISP:

> "I did attend the Mainstream class on May 13. During the class they would not tell you anything further about the buyout until you agreed to take the buyout. I was not being given enough information about the buyout to make that decision."

And another employee:

> "During the Mainstream class they would not give out any information about the buyout. . . We were told that they could not discuss the details or particulars of the buyout . . .and we would have to talk to either Mr. Danahy or Mr. Schmer. . . "

Finally, the Appellate Court in finding no unconscionability[20] implicitly found the "release" was not unconscionable because White and Staponski received monies (inferentially to which they were not already entitled) and were provided medical coverage and offered training courses. But White and others did not receive the insurance coverage they were promised; AND part of the money received was money already due and owing them; AND White and Staponski did not receive

---

[20] See Appendix E-16 - E-18

the training they were promised as shown by the uncontroverted record:

White did not receive the insurance coverage promised:

> "I have not received all the items promised me by GM. . . . Specifically, the insurance promised me has not been supplied in total. I have received no job placement assistance from G.M. or Mainstream. Additionally, when I inquired about attending "entrepreneur class" in November of 1987 I was told that I must pay my own way to Detroit in order to attend the program."

Staponski did not receive the job counseling or placement he believed had been promised:

> "I was told at the Mainstream class that an "entrepreneur class" would be made available to me at GM expense, should I sign the buyout papers. I understood Mr. Allen to state in Mainstream that I would receive job placement assistance, including help in contacting potential employers and assistance in obtaining new employment, if I took the buyout from GM. I have received no such job placement assistance from GM or Mainstream. Additionally, when I inquired about "entrepreneur school" in November of 1987, I was told that I must pay my own way to Detroit."

However, even assuming the facts recited in the opinion are true, these are not the

facts under Kansas, or most other states', common law to be considered in determining whether an agreement is unconscionable. In Wille v. Southwestern Bell Telephone Co., 219 Kan. 755, 549 P.2d. 903 (1976), the Kansas Supreme Court identified factors to be considered in determining the applicability of the unconscionability doctrine to a given set of facts, some of which are applicable to the case at bar, including:

> 1. The use of printed form or boiler plate contract drawn skillfully by the party in the strongest economic position,
>
> 2. The circumstances surrounding the execution of the contract, and
>
> 3. An overall imbalance in the obligations and rights imposed by the bargain and inequality of bargaining or economic power.

These facts unequivocally demonstrate the erroneous nature of the lower courts' decisions in finding there was no material issue of fact to be submitted to a jury on the issues of duress, ambiguity and unconscionability in the releases. That such

a decision was made, under the alleged auspices of Rule 56, by not one but two courts, further dictates the need for this Court to address the question presented.

Finally, that the lower courts do not apply a universal rule even within their own circuit is demonstrated by the Tenth Circuit's ruling a factually identical[21] case to White I, Torrez v. Public Service Co. of New Mexico, Inc., 54 EPD Par. 40,109 (10th Cir, 1990 (Dec'd July 20, 1990)), one day

---

21 Torrez was employed by defendant for over eight years and was a foreman in a manufacturing environment. On March 31, 1986 Torrez was notified by letter his position was being impacted as a part of a downsizing of the company work force due to economic problems. The letter told Torrez he had until April 30, 1986 (30 days) to select early retirement, voluntary separation, or involuntary separation. Defendant later held an orientation for all affected employees to discuss the separation packages and Torrez attended. It was not suggested to Torrez that he obtain legal advice and Torrez did not consult an attorney or ask for time to consult with one.

after its decision in White I with a different result--remand to the District court for trial by jury of the "voluntariness" issue. The decision and analysis in White I cannot be reconciled with the decision and analysis in Torrez, nor with the decision and analysis of this court and other circuits addressing the issue.[22]

To permit the decision in White I to stand is to adopt a rationale at odds with the reality of the marketplace for non CBA employees faced with the proverbial "Hobson's choice". As the court stated in Torrez,

---

[22] The following cases are cited to in Torrez at 63,457: Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n. 15 (1984); Trujillo v. Colorado, 649 F.2d 823, 827 (10th Cir. 1981); Shaheen v. B.F. Goodrich Co., 873 F.2d 105, 108 (6th Cir. 1989); Stroman v. West Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989); Riley v. American Family Mut. Ins. Co., 881 F.2d 368, 373-74 (7th Cir. 1989); Bormann v. AT & T Communications, Inc. 875 F.2d 399, 402 (2d Cir.), cert. denied, 110 S.Ct. 292 (1989); Cirillo v. Arco Chem Co., 862 F.2d 448, 451 (3d Cir. 1988); Coventry v. United States Steel Corp., 856 F.2d 514, 522-23 (3d Cir. 1988);and Rogers v. General Elec. Co., 781 F.2d 452, 456 (5th Cir. 1986).

Ibid. at 63,457:

> " . . . unambiguous language cannot derail our analysis of whether the waiver was made 'knowingly and voluntarily'. . . . When Torrez chose the voluntary separation package, he was required to sign the release. The choice between the two separation packages was "Hobson's choice", (citing cases) because Torrez had to opt between a nearly certain layoff with no retirement benefits or obtaining the future retirement benefits available only if he signed the release. He testified at his deposition that he signed the release in order save his retirement benefits, even though he felt he had been unjustly terminated.FN
>
> ---
>
> FN This choice indicates there may have been duress in the form of unfair economic pressure placed on plaintiff to sign the release.

For these reasons petitioners request the court grant their request for certiorari on the issue presented.

2. Whether a court after finding there are insufficient facts to submit a claim to the jury under Rule 56, should use that conclusion to support its subsequent finding that a Rule 11 violation has occurred?

The Tenth Circuit in Burkhart v. Kinsley Bank, 804 F.2d 588 (10th Cir. 1986) has followed other circuits in adopting an objective standard to evaluate alleged Rule 11 violations. This objective evaluation is of the signer's certification tested as of the time the pleading, motion or other paper is signed, and not from hindsight of the product of that signing. Adv. Com. Note to F.R.Civ.P. 11, 97 F.R.D. at 199. However, despite this admonition from the Committee, increasingly when a Rule 56 Motion is granted a defendant in disfavored employment[23] litigation, Rule 11 sanctions are requested

---

[23] Studies indicate civil rights and employment discrimination cases are the subject of a disproportionate number of sanctions. Vairo, "Rule 11: A Critical Analysis", 118 F.R.D. 189, 200-201. See also Elison and Rothschild, "Rule 11: Objectivity and Competence;" Wright & Miller, Suppl. to Vol. 5, pp. 241-246 (Aug. 1989).

and granted on the basis of the antecedent decision. In effect the District court substitutes what it considered a "reasonable" conclusion to draw from the facts, for what plaintiff's counsel and his client considered "reasonable", sanctioning counsel and the client because they did not think as the court thought. When this occurs, the sanctions have a "chilling effect" in contradistinction to the intent of the Advisory Committee notes which state Rule 11 is not "intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories". The line is "thin" as noted in Judge Weinstein's dissent in Eastway Construction Co. v. New York, 637 F. Supp. 558, 567 (on remand) (E.D.N.Y. 1986), mod'f, 821 F.2d 121, 122-24 (2d Cir), cert. denied, 108 S.Ct. 269 (1987):

> " . . . Attorneys. . . have the ethical obligation (subject to tactical considerations) to present to the court all the non-frivolous arguments that might be made on their clients' behalf, even if only barely non-frivolous. They

> are forced by their positions as advocates in the legal profession to live close to the line, wherever the courts may draw it. Yet Rule 11 threatens severe sanctions if they miscalculate ever so slightly the location of that line."

Although failure to prevail or advocating new or novel legal theories should not be grounds for triggering a sanction award, Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3rd Cir. 1987)\[24], the fact is Rule 11 sanctions are being used aggressively against plaintiffs and their counsel in the continuing emerging employment litigation field following entry

---

[24] In Gaiardo, the defendant moved for its attorney's fees two months after succeeding on a motion for summary judgment. The issue was whether applicable state law provided an exception to the employee at will doctrine in a "whistle blowing" context. The court recognized the doctrine has been the source of increasing controversy over the last 25 years, and there has been an effort to liberalize the doctrine in favor of employees. The state law cases cited by plaintiff had been narrowly written and recognized the winds of change. Accordingly, the plaintiff's claims could not be regarded as frivolous. Rather, finding a Rule 11 violation in these circumstances would indeed chill effective advocacy and would run directly contrary to the Rule's language and intent.

of a Rule 56 judgment in defendant's favor.

In the instant case, in order to make an objective evaluation at the time of signing, the District court would necessarily have to determine: (1) whether the filings actually made were well founded in existing fact and law or a good faith extension of existing law at the time filed; (2) whether the parties to be sanctioned needed the release in hand and were able to obtain a copy of the release before proceeding to file suit; and (3) whether there was absolutely no reason to believe under Kansas law, or a good faith extension of Kansas law, Caranchini, White and Staponski could file the lawsuit on the underlying claims without first moving to set aside the release. However, both the District and Appellate courts failed to make such an analysis and instead relied on their findings in the antecedent Rule 56 decision rather than the analysis set forth above as shown by the following excerpts from

White II: (Appendix F-18 - F-20):

> "The district court held that plaintiffs' claims for wrongful discharge and breach of contract were sanctionable because plaintiffs had executed valid releases at the time of their termination. The court found that plaintiffs failed to reasonably inquire into the existence of the releases before filing suit in this case, that a reasonable inquiry would have revealed their existence, and that a reasonable attorney knowing of their existence would not have filed suit.
>
> * * *In their pleadings, plaintiffs did occasionally question the existence or facial validity of the releases; however, they pleaded in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.

(Appendix F-19):

> ". . .We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their claims, but because they failed to act reasonably given the results of their inquiries. . . .".

(Appendix F-22):

> ". . . The district court also sanctioned plaintiffs for alleging that the releases were void due to ambiguity. Plaintiffs point out that the exact duties of GM are not set out in the releases. But the

releases clearly state that all present and future claims, known and unknown, were released by White and Staponski. Further, plaintiffs failed to allege any real confusion caused by any ambiguities in the releases. There is no substantial disagreement between the parties on the terms of the contract."

(Appendix F-24 - F-25):

". . .The district court justified its decision to sanction the plaintiffs in part because of evidence of improper purpose, manifested by their threats against GM to utilize the media to create adverse publicity for GM and in their unwarranted\[25] discovery requests. In making this fact determination and in evaluating the improper purpose prohibition of Rule 11, it relied in part upon plaintiffs' failure to make reasonable inquiry and failure to make claims\[26] cognizable\[27] under the law.

---

[25] Although the Appellate court found the discovery, again with hindsight, "unwarranted," both the Magistrate and the District court had not only allowed but ordered discovery to proceed on the underlying claims.

[26] The "claims" referred to cannot be the "whistleblowing" or "breach of implied contract" counts as neither the District nor Appellate Courts at any time commented in their opinions about the viability of the underlying claims. "Claims" must therefore refer to Caranchini, White and Staponski's position that the releases were void due to duress, vagueness, ambiguity and unconscionability.

> We cannot find the court's fact findings clearly erroneous or its decision to sanction an abuse of discretion."

Further, the District and Appellate courts relied on the antecedent adverse Rule 56 judgment even while finding that nonfrivolous ADEA\[28] or whistleblowing claims could have been made\[29] if Caranchini had

---

[27] "Cognizable" is an inappropriate word; rather the phrase "claims cognizable" in reality refers to facts sufficient to submit to a jury the affirmative defenses to the claim of release by GM.

[28] An ADEA claim was not pled because Staponski was not 40 at the time of signing; White was barely 40; and an investigation indicated that more blacks and women under 40 had been the target of SISP as opposed to white males over 40 who GM retained as employees.

[29] White II, Appendix F-22 - F-23:

". . .As we have discussed in White I, there were arguments to set aside the releases that could have been made that would not have warranted sanctions. A reasonably competent attorney could have filed a colorable, nonfrivolous ADEA case against GM. Although it would be more difficult, a nonfrivolous common law whistleblowing claim also might have been brought."

The above referring to White I, Appendix E-22 - E-23: (Footnote cont'd next page)

first moved to set aside the releases on grounds of economic coercion and unconscionability. This finding turns upon the District and Appellate courts inferentially finding, without any statement in the opinions whatsoever, that Caranchini was required to set the releases aside on grounds of economic duress and unconscionability before proceeding with her clients' "nonfrivolous ADEA and whistleblowing claims." However, once again neither the District nor Appellate Court

---

". . .Had plaintiffs forthrightly acknowledged their signing of a release at the time of their termination, and then attacked the releases on an economic coercion/unconscionability theory in an age discrimination action, that portion of their case certainly would not have been frivolous. (citing Paollilo, 821 F.2d 81, and Bodnar, 843 F.2d 190,) With the aid of these cases, we think plaintiffs could have formulated a whistleblowing claim also that could not have been considered frivolous.

Thus, plaintiffs might have articulated nonfrivolous claims in district court, but did not do so. . ."

cited any Kansas substantive law or federal procedural law for this proposition. White II demonstrates the incongruities that can arise when an antecedent Rule 56 judgment is used to support a finding of sanctions.

3. Whether Rule 11 was intended to be used to impose sanctions where colorable theories exist, but the court disapproves of the manner in which the case was pled?

The "think as I think and do as I would have done"[30] rationale of the Tenth Circuit is given further support by its findings, without any support in Kansas substantive or federal procedural law, that Caranchini should have moved to set aside the releases on an economic coercion/unconscionability

---

[30] This is referred to in various comments on Rule 11 as the "product" approach which according to the scholars provides the greatest possible scope for fee shifting. The message of the product approach for the lawyer who is sanctioned is either "be smarter" or, at any rate, "think as I think". See "Studies of the Justice System: Rule 11 in Transition", The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, Stephen B. Burbank, at 16-25.

theory before proceeding with her "nonfrivolous ADEA\whistleblowing" claims.[31] The Appellate Court saw no inconsistency[32] in sanctioning Caranchini, White and Staponski in White II for raising economic coercion\unconscionability in the manner they did,[33] while at the same time finding:

1) in White I\[34] such theories would have been viable if they had been pled in the first instance as grounds to set aside the releases before proceeding on

---

[31] If this was the "preferred" or "proper" way to proceed the District Court could have granted the parties' stay request below on non release discovery items, granted GM's Motion for Separate Trial on the Issue of Release, none of which was done.

[32] Caranchini raised these inconsistencies in Petitions for Rehearing and Suggestions for Rehearing en banc of both White I and White II which were denied by the Court.

[33] See White II excerpts, pp. 50-51 infra.

[34] See Footnote 29, p. 53 infra.

"non frivolous[35] ADEA and whistleblowing claims," and

2) finding in White I\[36], economic coercion\unconscionability are defenses to the affirmative defense of release which it was GM's obligation to plead, and

3) finding in White I,[37] White and Staponski had a colorable whistleblowing claim based upon a good faith extension of the law on a theory of economic duress/unconscionability!

GM moved for summary judgment in the District Court in part on the ground that Rickman v. Cone Mills Corporation[38] required

---

35 Apparently, moving to set aside the release would have made these two claims (ADEA and whistleblowing) "nonfrivolous".

36 Appendix E-11

37 Appendix E-8

38 Case No. 85-2430 in the District of Kansas, Slip Opinion issued by the Tenth Circuit, October 24, 1989, but not published, Case No. 87-1830 in the Tenth Circuit.

the setting aside of the release prior to proceeding with the underlying claim. Although neither the District nor Appellate Courts recited to Rickman (or any other case) for this proposition, the District Court and appellate court opinions in White I and White II rely on this rationale for the grant of summary judgment as well as the grant of sanctions despite Rickman being overturned and remanded to the Kansas District court for further proceeding.

Heretofore, there is a total lack of authority under Rule 11 for the proposition set forth in White I and White II that counsel and their clients may be sanctioned because of the manner in which they choose to plead their case. If counsel and their clients are going to be sanctioned under Rule 11 for not pleading and handling a case as a District or Appellate Court would have proceeded with the case, although there is no authority for claiming one as opposed to the

other is the correct, or even "more correct" way of proceeding, then aggressive pursuit of claims, usually for tactical reasons, will be abandoned by counsel for the "tried and true safe approach". Novel and creative theories of the law will not be presented, and the common law, which grows from "novel and creative theories" will cease to expand. No doubt that is the goal of some judges in granting Rule 11 sanctions; the question presented is, however, was it the intended and correct utilization of Rule 11 or is it a tool to stifle disfavored lawsuits, whatever they might be at the time.

4. Whether the court when it imposes monetary sanctions under Rule 11 for the entire cost of the litigation violates the "American Rule" against fee shifting?

The "American Rule" is quite simply that each party shall bear its own costs of litigation rather than shifting to the loosing party the costs of litigation. Even statutes providing for attorneys fees do so

only to the winning party. When Courts, as the lower courts did here, shift the entire "reasonable"[39] cost of defense to the loosing party as a sanction under Rule 11, the question presented is whether such a sanction violates, or was intended to violate, the American Rule.

The Advisory Committee Notes state the purpose in proposing the amendments to Rule 11 was to make it "effective in deterring abuses". The Committee's goals were to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses". Deterrence is the goal of amended Rule 11,

---

[39] The Appellate Court has remanded to the lower court the case for a finding of the appropriate amount of sanction. The Appellate Court infers, although it is not clear, that Caranchini, Skinner (local counsel), White and Staponski should be sanctioned for a "reasonable" amount of the cost of defense, without guidelines as to what was "reasonable" or what should be considered, or not considered, as far as the defendant's conduct was involved, in reaching that amount.

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 877 (5th Cir. 1988) (en banc), Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987)(en banc); In re Yagman, 796 F.2d 1165, 1183 (9th Cir.), amended, 803 F.2d 1085 (9th Cir. 1986), cert. denied, 108 S.Ct. 450 (1987). Compensation is not mentioned. "Studies of the Justice System: Rule 11 in Transition", supra. at 11.

Fee shifting results more frequently when a court uses an antecedent decision on a Rule 56 motion to support a sanction finding, as in the case at bar. However, even if that is not the case, the question remains whether under any circumstances, sanctions for the entire cost of litigation is at any time appropriate, and if so, when.

The target is "abuse" and the goal of Rule 11 is not wholesale fee shifting but correction of litigation abuse. Although the payment of an adversary's attorney's fees combines the concepts of deterrence and

reimbursement, fee shifting should not be the result of a Rule 11 violation. Gaiardo, supra. 482-483. If the awards under Rule 11 become greater, the rule will be seen as a fee shifting device; and, as that occurs, there will be a natural increase in Rule 11 motions and cordiality among attorneys will break down, making it harder to settle cases. Vairo, "Rule 11: A Critical Analysis", supra.

Although awarding the "lodestar" amount has been discouraged by appellate courts, as the Tenth Circuit decision in White II indicates, it is still being awarded. This court has not addressed whether an award of the "lodestar" amount, or the "reasonable" cost of defense, should under any circumstances be an appropriate sanction under Rule 11.

CONCLUSION

Petitioners White and Staponski request this court grant their Petition for

Certiorari on the issue of whether Rule 56 is a proper vehicle for determining issues of voluntariness, ambiguity, unconscionability with respect to releases signed without the advice of counsel so that guidance may be given to lower courts on this increasingly utilized tool by employers to bar claims under federal, state and common law employment theories.

Petitioners White, Staponski and Caranchini request this court grant their Petition for Certiorari with regard to the questions raised regarding Rule 11 so that lower courts will have more direction in the awarding of sanctions where summary judgment has been entered, where issues of pleading are concerned, and where the court is considering the entry of judgment for the entire cost of defense.

Respectfully submitted,

THE LAW OFFICES OF GWEN G. CARANCHINI, P.C.

BY _____

Gwen G. Caranchini*
3101 Broadway, Suite 420
Kansas City, Missouri 64111
(816) 931-2800

Attorneys for Petitioners White,
Staponski and Caranchini

November 23, 1990
*Application to the Bar of the Supreme
Court Pending

APPENDIX A

Order of the United States Court of Appeals for the Tenth Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FREDERICK LAWRENCE WHITE, JR.; BENJAMIN L. STAPONSKI, JR.,

Plaintiffs-Appellants,

vs.

GENERAL MOTORS CORPORATION, INC.,

Defendant-Appellee,

No. 88-2684

FREDERICK LAWRENCE WHITE, JR., BENJAMIN L. STAPONSKI, JR.,

Plaintiffs-Appellants,

and

GWEN G. CARANCHINI,

Appellant,

vs.

GENERAL MOTORS CORPORATION, INC.,

Defendant-Appellee.

Nos. 89-3159
89-3182

ORDER
Filed September 13, 1990

Before LOGAN, McWILLIAMS and BRORBY, Circuit Judges.

Appellants' motions to stay mandate in the captioned cases pending filing of the petition for certiorari with the Supreme Court is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: S/S
Patrick Fisher
Chief Deputy Clerk

APPENDIX B

Order of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREDERICK LAWRENCE WHITE, JR.; and BENJAMIN L. STAPONSKI, JR.,

No. 88-2684

Plaintiffs - Appellants,

vs.

GENERAL MOTORS CORPORATION, INC.

Defendant - Appellee.

ORDER
Filed September 7, 1990

Before LOGAN, McWILLIAMS,and BRORBY, Circuit Judges.

Appellants' motion for leave to file addendum to their petition for rehearing and suggestion for rehearing en banc is denied. See 10th Cir R. 35.1.

Entered for the Court
ROBERT L. HOECKER, Clerk

By S/S
Patrick Fisher
Chief Deputy Clerk

APPENDIX C

Order of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREDERICK LAWRENCE WHITE, JR. and BENJAMIN L. STAPONSKI, JR.,

Plaintiffs-Appellants,

vs.

GENERAL MOTORS CORPORATION, INC.

Defendant - Appellee.

No. 88-2684

ORDER Filed August 27, 1990

Before: HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK and BRORBY, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing with suggestion for rehearing en banc, filed in the captioned case.

Upon consideration of the petition for rehearing, the petition is denied by the panel to

whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Ebel did not participate.

Entered for the Court

S/S
ROBERT L. HOECKER, Clerk

APPENDIX D

Order of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREDERICK LAWRENCE WHITE, JR.; and BENJAMIN L. STAPONSKI, JR.,

Plaintiffs - Appellants,

vs.

GWEN G. CARANCHINI,

Appellant,

vs.

GENERAL MOTORS CORPORATION, INC.

Defendant - Appellee.

Nos. 89-3159
89-3182

ORDER
Filed August 27, 1990

Before HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK and BRORBY, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing with

suggestion for rehearing en banc, filed in the captioned cases.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the cases were argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Ebel did not participate.

Entered for the Court

S/S
ROBERT L. HOECKER, Clerk

APPENDIX E

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FREDERICK LAWRENCE WHITE, JR.; and BENJAMIN L. STAPONSKI, JR.,

Plaintiffs - Appellants,

vs.

GENERAL MOTORS CORPORATION, INC.

Defendant - Appellee.

No. 88-2684

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 88-2053S)
Filed July 19, 1990

Gwen G. Caranchini, Kansas City, Missouri, for Plaintiffs-Appellants.

Paul Scott Kelly, Jr. (R. Kent Sellers with him of the brief) of Gage & Tucker, Kansas City, Missouri, for Defendant-Appellee.

Before LOGAN, McWILLIAMS, and BRORBY, Circuit Judges.

LOGAN, Circuit Judge.

This diversity case commenced as one for wrongful discharge, breach of contract, and slander under Kansas law. The appeal is from the district court's order granting defendant General Motors Corporation's (GM) motion for summary judgment on all counts. See White v. General Motors Corp., 699 F. Supp. 1485 (D. Kan. 1988). Plaintiffs, Frederick Lawrence White, Jr. and Benjamin L. Staponski, Jr., contend that the following errors by the district court require the reversal of its order: (1) the district court failed to appropriately apply Kansas law protecting whistleblowers from retaliatory discharge; (2) the releases signed by White and Staponski, which were relied on by the district court in dismissing their retaliatory discharge and breach of implied employment contract actions, are void due to duress, fraud,

ambiguity, and unconscionability; (3) summary judgment was not appropriate because there remained issues of fact to be resolved in White's slander action. [1]

Summary judgment is proper when no material issues of fact are in dispute, and only issues of law remain. All disputed facts must be resolved in favor of the party resisting summary judgment. We review the grant of summary judgment de novo, applying the same standards as the district court. Flanagan v. Munger, 890 F.2d 1557, 1561 (10th Cir. 1989); Fed. R. Civ P. 56(c).

---

[1] We do not reach the merits on the claim of breach of implied employment contract because we hold that the releases are valid and conclusively bar any action deriving from claims to continued employment or the method of plaintiffs' termination. By their terms, however, the releases do not bar actions based on GM's behavior after the terminations. The validity of the releases is therefore irrelevant to White's slander action, which we consider separately.

White and Staponski were both sixth level supervisors at GM's Fairfax plant in Kansas City, Kansas. In May 1987, White and Staponski's employment at GM was terminated under GM's Special Incentive Separation Program (SISP). Acceptance of SISP required signing a written "Statement of Acceptance," which provided that in exchange for lump sum payments, some career retaining and job search skills training, and certain insurance benefits, the terminated employees would release all claims to future employment with GM and would

> "release and forever discharge General Motors and its officers, directors and employees from all claims, demands, and causes of action, known or unknown, which I may have based on the cessation of my employment at General Motors. This release specifically includes any possible claims I may have under the Age Discrimination in Employment Act, the fair employment practice or civil rights act of 1964, and any other federal, state, or local law, order, or regulation, or the common law relating to employment and

> any claims for breach of employment contract, either express or implied. I further agree not to institute any proceedings against General Motors or its officers, directors, agents, employees, or stockholders, based on any matter relating to the cessation of my employment at General Motors, including, without limitation, actions under the Age Discrimination in Employment Act and the fair employment practice or civil rights law of 1964."

I R. tab 10, Exs. 2-A, 2-B

Plaintiffs were given two weeks off with pay to consider the SISP offer. During this time, they arranged to consult an attorney.[2] GM notes that despite White and Staponski's professed dislike of the separation terms, they signed the

---

[2] GM correctly points out that although the attorney provided plaintiffs with no advice, due to their decision not to retain him, that does not affect the fact they had an opportunity to gain legal advice during the two weeks they considered the proposal; moreover, plaintiffs' consultation with an attorney clearly indicates that they were aware that legal advice would be beneficial to them.

releases, and have retained the lump sum payment and other benefits provided. GM contends, therefore, that White and Staponski's claims for retaliatory discharge, breach of contract, and slander are barred by the terms of the release.

White and Staponski assert that the releases were executed under duress and cannot, therefore, act to bar their claims. Specifically, the plaintiffs argue that their supervisors at GM gave them two choices--either accept the terms of SISP or be terminated with no benefits. Alternatively, plaintiffs claim that the releases were ambiguous, that their agreement to participate in SISP was induced by fraud, and that the terms of their separation were unconscionable. Plaintiffs contend that they were forced to accept the SISP because they complained of defective brake installation at the Fairfax plant.

I

Kansas adheres to the employment at will doctrine, and we are therefore required to presume, absent an agreement to the contrary, that any employment relationship may be severed by either party at any time, for any reason. Palmer v. Brown, 242 Kan. 893, 752 P.2d 685, 687 (1988); Polson v. Davis, 635 F. Supp. 1130, 1149 (D. Kan. 1986), aff'd, 895 F.2d 705 (10th Cir. 1990). However, Kansas does recognize an exception to the doctrine which allows a wrongful discharge suit when an at-will employee is fired for a reason that contravenes some established public policy. Palmer, 752 P.2d at 687-90; Coleman v Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645, 647-649 (1988).

White and Staponski allege that during the last year of their employment they complained to GM management of various defects in brake

installation at the Fairfax plant; their complaints were met with resistance; and they were reprimanded by plant supervisors for having drawn attention to the defects. Plaintiffs contend that their reports to GM managers constitute whistleblowing within the parameters of the Kansas Supreme Court's opinions in Palmer and Coleman. We agree. In Palmer, the court defined whistleblowing as "the good faith reporting of a serious infraction of...rules, regulations, or the law [affecting public health, safety or general welfare] by a coworker or an employer to either company management or law enforcement officials." 752 P.2d at 690. Termination in retaliation for whistleblowing is an actionable tort, despite Kansas' continued adherence to employment at will. Id.

Nevertheless, to maintain an action for

wrongful discharge, White and Staponski must demonstrate that they were treated differently because of their whistleblowing activity. See id. at 690 (plaintiff bears burden of proving that she was discharged in retaliation for whistleblowing). It is undisputed that plaintiffs were only two of many employees who were offered participation in the SISP. To rebut the inference of no dissimilar treatment that arises from this fact, plaintiffs claim that other employees offered participation in SISP were told they could remain at GM in some unspecified positions even if they refused SISP; only White and Staponski were threatened with certain discharge if they refused the program.[3]

---

[3] White and Staponski do not argue that they were never told of the possibility of remaining at GM. Instead, they appear to argue that they were informed just before signing the release of the possibility that they could remain at GM in a position of "extreme vulnerability." Furthermore, they allege that when asked to

We accept White and Staponski's factual summary of their termination because all factual questions must be resolved in favor of the parties resisting summary judgment. We therefore assume, for the purposes of this opinion, that White and Staponski were constructively terminated because of their whistleblowing activities. Had they not executed the releases at issue in this case, they would have had a

---

define "extreme vulnerability, "GM supervisors stated that it meant a job from which White and Staponski were certain to be fired. They do not allege that they requested, and were refused, more time to consider this new wrinkle. Nor do they allege that they would have accepted the unspecified positions had they been ordered earlier. Because factually the jobs of extreme vulnerability appear only to represent a delay of what was presented to the plaintiffs as inevitable firing, we will treat the offer as a nullity and assume, for the purpose of this appeal, the plaintiffs were threatened with termination because of their whistleblowing activities.

colorable wrongful discharge action. We therefore turn to the validity of the releases.

II

Kansas law favors resolution of disputes through compromise and release. See Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788, 803 (1980). The existence of a release is an affirmative defense; the defendant bears the burden of establishing it. Tabor v. Lederer, 205 Kan. 746, 472 P.2d 209, 211 (1970).

White and Staponski contend that the releases they signed are ineffective due to fraud, ambiguity, and duress. We disagree. Plaintiffs failed to allege with particularity any fraud in the inducement of the releases. There is not evidence that GM misrepresented or withheld any information necessary to the plaintiffs' decisionmaking. The district court properly granted summary judgment on this issue.

Moreover, the release documents, which were identical in substance, were each only one page long. Although specific statutes were mentioned, there is no indication that plaintiffs were confused regarding what rights they were waiving. Each testified in deposition that he understood his rights and that by executing the release he was waiving them. I R. tab 50 at Ex. 7 p. 61-64 (White deposition); id. at Ex. 8, p. 54 (Staponski deposition). White and Staponski, despite reciting a laundry list of alleged ambiguities in the releases, do not assert any confusion or disagreement between the parties regarding the terms of SISP.

Plaintiffs were given two weeks to consider GM's offer: they had the opportunity to talk to an attorney; they contacted personnel at GM to ask questions; they attended one of the career training sessions offer by GM and talked about

the proposal with their offerees. We think that Kansas would adopt the view that the fourteen day consideration period was reasonable and noncoercive. Cf. Bodnar v. Synpol, Inc., 843 F.2d 190, 193-94 (5th Cir.), cert. denied, 109 S. Ct. 260 (1988) (In ADEA context, acceptance of early retirement proposal voluntary if offerees had time to consider it and consult attorney; fifteen days not unreasonable).

Plaintiffs argue that GM's threats against their jobs constitutes duress and that this invalidates the releases. Other jurisdictions, in the age discrimination context, have held that threats of termination may void releases signed in conjunction with early retirement programs, dependent, of course, on the facts. See Paollilo v. Dresser Industries, Inc., 821 F.2d 81, 84-85 (2d Cir. 1987); Henn v. National Geographic Soc., 819 F.2d 824, 828-29 (7th Cir.) cert. denied, 484

U.S. 964 (1987); Bodnar, 843 F.2d at 193-94; Annotation, What Constitutes Duress by Employer or Former Employer Vitiating Employee's Release of Employer from Claims Arising Out of Employment, 30 A.L.R. 4th 294 (1984). See also Laemmar v. J. Walter Thompson Co., 435 F.2d 680 (7th Cir 1970) (recognizing threat of termination as duress in action to rescind employee stock transfer). Kansas has not considered this "economic duress" issue in an employment context. We must therefore predict what the Kansas Supreme Court would decide in a case like that before us. The Kansas Supreme Court has said whether facts as alleged by a party are sufficient to constitute duress is a question of law, Hastain v. Greenbaum, 205 Kan. 472, 470 P.2d 741, 746 (1960); thus, we review de novo the district court's holding that plaintiffs did not sign the SISP releases under duress.

While Kansas recognizes duress when one party, by a threat, deprives another of that free will essential to the formation of a legal contract, it is clear that not all threats, even if unlawful, will give rise to a defense of duress. Id. The Kansas Supreme Court stated that "a transaction cannot be held to have been induced by duress, notwithstanding any threats which may have been made, where the party had and took an opportunity for reflection and for making up his mind, and where he consulted with others and had the benefit of their advice, especially where he was advised by his counsel." Id. at 748 (quoting 1 Black on Recission and Cancellation, 2d ed., S 223 at 630-631) (emphasis added). It is undisputed that Plaintiffs in the instant case took two weeks off with pay to consider the offer, during which time they consulted with each other, with GM officials, with other offerees,

and with an attorney. We do not believe that the Kansas Supreme Court would approach the duress issue differently because of the parties' employment relationship, and we think it would hold that there was not enough to go to a jury on the duress issue in this case.

White and Staponski argue that the releases they signed are void for unconscionability. They argue, inter alia, that the releases are unconscionable because they were printed forms drawn up by GM, because GM's bargaining power exceed theirs, because the contract was offered on a take it or leave it basis, and because the terms were ambiguous or deceptive. See Wille v. Southwestern Bell Telephone Co., 219 Kan. 755, 549 P.2d 903, 906-907 (1976).

In order to be unconscionable the agreement must be "so outrageous and unfair in its wording or its application that it shocks the conscience

or offends the sensibilities of the court, or is against public policy." Adams v. John Deere Co., 13 Kan. App. 2d 489, 774 P.2d 355, 357 (1989). Thus, unfairness alone is not enough--the unfairness must rise to a level of outrage or contravene public policy.

Without repeating previous discussion, we observe that plaintiffs were given ample time and opportunity to consider the offer. They were paid a substantial sum of money ($54,869.88 to White, $66,136.40 to Staponski), were provided with continuing medical insurance coverage, and were offered training courses to facilitate their career change. In context, the terms of plaintiffs' separation from GM do not appear unconscionable. Our collective conscience is not shocked.

Plaintiffs also argue that the court must consider the fraud and duress in the inducement

of the contracts in order to evaluate unconscionability. We agree that such circumstances as fraud and duress, if they were present, should influence the determination of unconscionability, see Wille, 549 P.2d at 907; however, we have determined as a matter of law that the plaintiffs have failed to present sufficient evidence of fraud or duress to survive a motion for summary judgment.

Because we hold that the releases signed by plaintiffs are not voidable due to fraud, ambiguity, duress, or unconscionability, plaintiffs' claims for wrongful discharge and breach of contract are barred by the releases. Summary judgment on the claims of retaliatory discharge and breach of employment contract was properly granted.

III

The district court's grant of summary judgment

on plaintiff White's slander claim was also proper. In his pleadings and affidavit, White asserts that he applied for a job as a store manager trainee with Westlake Hardware. He discussed the job with several persons at Westlake, including Cynthia Mason. During one of his discussions with Mason, he stated that he had been forced out by GM, after eleven years of service. He claims that during this conversation, Mason mentioned a lawsuit against GM, then corrected herself, and made "some mention" of his being a "troublemaker." II R. tab 44, Ex. A-47. From this he concludes that Mason must have contacted GM and that someone at GM must have referred to him as a troublemaker.

GM has introduced the affidavit of Cynthia Mason, in which she stated that she has not discussed White with anyone at GM. Id. Ex. A-48. GM has also introduced the affidavits of GM

personnel supervisors, who stated that neither they nor anyone known to them had accused White of being a troublemaker in response to a request for a reference.[4] Faced with these affidavits, White cannot rest on his contention that GM has introduced no affidavits swearing that no one at GM has said anything defamatory to anyone at Westlake. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is the plaintiff's burden to introduce specific evidence of what was said, by whom, and to whom. Schulze v. Coykendall, 218 Kan. 653, 545 P.2d 392, 396-97 (1976). White's affidavit, which fails to ascribe any defamatory statements to GM, is not sufficient to raise a material question of fact, and White's case must fail. See Celotex Corp., 477 U.S. at 322 ("[T]he

---

[4] These officials were identified by plaintiffs as being the ones to whom Mason spoke (or was likely to have spoken).

plain language of [Fed. R. Civ. P.] 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). We therefore affirm the district court's grant of summary judgment on White's slander claim.

IV

GM has requested an award of sanctions and attorney's fees against the plaintiffs because, it argues, this appeal is frivolous. Fed. R. App. P. 38; 28 U.S.C. S 1927; Tenth Cir. R. 46.5. We deal with sanctions levied by the district court upon plaintiffs and their attorney for the filing of this lawsuit and their actions in the district court in a common appeal, White v. General Motors Corp., Nos. 89-3159 & 89-3182,

_____ F.2d _____ (10th Cir. 1990) (White II), filed today. We there affirm in part and reverse in part, remanding for further proceedings in accordance with standards we set out in the opinion. Given the fact that we affirm the district court's dismissal of the lawsuit on its merits, and that we find plaintiffs' actions in the district court sanctionable, it might seem an easy determination to award sanctions against plaintiffs and/or their counsel for bringing this appeal. But this is not so.

Had plaintiffs forthrightly acknowledged their signing of a release at the time of their termination, and then attacked the releases on an economic coercion/unconscionability theory in an age discrimination action, that portion of their case certainly would not have been frivolous. In Paollilo, 821 F.2d 81, the Second Circuit overturned a grant of summary judgment in an

analogous case in which the employee was given only six days to sign an early retirement agreement. In Bodnar, 843 F.2d 190, another similar case, the Fifth Circuit struggled a bit before finding that giving employees fifteen days to decide on an early retirement program was enough to deny an age discrimination claim. With the aid of these cases, we think plaintiffs could have formulated a whistleblowing claim also that could not have been considered frivolous.

Thus, plaintiffs might have articulated nonfrivolous claims in district court, but did not do so. On appeal they did a somewhat better job, and the briefs and arguments on the duress and whistleblowing issues, though poorly done, cannot, considered by themselves, be deemed frivolous. We decline to hold that an appeal is frivolous per se if the presentation of the issues in district court was bad enough to be

sanctionable. Such a draconian rule would make sanctions available in nearly every appeal of a case dismissed for failure to state a claim, unless the appellant is successful. This would constitute too great a chill of advocacy. Therefore, we hold that sanctions are not proper here for the appeal on the duress and whistleblowing issues.

On the other hand, plaintiffs' arguments that the releases were void due to fraud and ambiguity, and plaintiff White's appeal of his slander claim, are patently frivolous. Plaintiffs fail to cite any evidence of fraud perpetrated by GM and seem totally confused regarding exactly what can constitute fraud. On the issue of ambiguity, plaintiffs argue, even in the face of their own deposition testimony that they understood documents they signed, that the releases were ambiguous. They were not. And

plaintiff White's appeal of the court's summary judgment on his slander claim, despite his inability to produce any evidence of what was said, by whom and to whom, is also a clear and obvious loser. These arguments, however, constitute only a very small portion of plaintiffs' briefs on appeal.

Unfortunately, clearly losing and frivolous issues are raised often in otherwise legitimate appeals. A check of recent cases reveals at least thirty-one published opinions of the Tenth Circuit since January 1988 in which we regarded issues raised by the parties as too unworthy or frivolous to even discuss. Perhaps we ought to sanction lawyers, and if appropriate their clients, for pressing arguments on appeal that obviously have no merit. But for now we choose to pass our judgment on the appeal as a whole. Because arguments concerning whistleblowing and

Kansas' recognition of economic duress as a basis for setting aside a release appear to form the principal basis of plaintiffs' briefs on appeal, we will overlook the fact that plaintiff's lesser arguments regarding fraud, ambiguity, and the merits of the slander judgment are clear losers. Cf. Granado v. Commissioner of Internal Revenue, 792 F.2d 91, 94-95 (7th Cir. 1986) (awarding Fed. R. App. P. 38 sanctions, despite appellant's one nonfrivolous argument, because twenty-two of twenty-four pages of appellant's brief concerned frivolous arguments), cert. denied, 480 U.S. 920 (1988).

ACCORDINGLY, the district court's granting of summary judgment is AFFIRMED, and sanctions on appeal are DENIED.

APPENDIX F

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FREDERICK LAWRENCE WHITE, JR.; and BENJAMIN L. STAPONSKI, JR.,

Plaintiffs-Appellants,

and

GWEN G. CARANCHINI
Appellant,

vs.

GENERAL MOTORS CORPORATION, INC.

Defendant - Appellee.

Nos. 89-3139
89-3182

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 88-2053S)

Gwen G. Caranchini, Kansas City, Missouri, (Linda Scott Skinner, Overland Park, Kansas, with her on the briefs) for Plaintiffs-Appellants.

Paul Scott Kelly, Jr. (R. Kent Sellers with him of the brief) of Gage & Tucker, Kansas City, Missouri, for Defendant-Appellee.

Before LOGAN, McWILLIAMS, and BRORBY, Circuit Judges.

LOGAN, Circuit Judge.

In a related appeal, White v. General Motors Corp., No. 88-2684, _____F.2d_____ (10th Cir. 1990) (White I), entered today we have affirmed the district court's grant of summary judgment in favor of General Motors Corporation (GM) on the merits of claims filed against it by former employees Frederick Lawrence White, Jr. and Benjamin L. Staponski, Jr. In the instant appeal White, Staponski and their attorneys[1] (hereinafter collectively "plaintiffs") challenge

[1]The complaint and many other filings were consigned by Linda Scott Skinner, who apparently served as local counsel in Kansas. The district court's order on sanctions directs they be paid by "plaintiffs and their attorneys." White v. General Motors Corp., 126 F.R.D. 563, 567 (D. Kan. 1989). The briefs on appeal, however, appear to treat Gwen G. Caranchini as the sole attorney subject to sanctions. Whether Skinner was intended to be held liable for sanctions is a matter to be clarified by the district court on remand.

the district court's award of Fed. R. Civ. P. 11 sanctions against them, jointly and severally, in the amount of $172,382.19. See White v. General Motors Corp., 126 F.R.D. 563 (D. Kan. 1989).

Plaintiffs make essentially five arguments on appeal: (1) the district court erred in imposing sanctions because plaintiffs' conduct satisfied Rule 11 and their arguments were meritorious; (2) the district court's order imposing sanctions was insufficiently specific to allow meaningful appellate review; (3) the amount of sanctions imposed was excessive; (4) the district court erroneously denied plaintiffs a hearing on sanctions; and (5) the district court erred in refusing to grant plaintiffs' Fed. R. Civ. P. 60(b) motion to reconsider its summary judgment order in favor of GM.

All of the issues raised are subject to review under an abuse of discretion standard. Cooter &

Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2460-61 (1990) (across the board abuse of discretion standard in Rule 11 cases); Valmont Indus. Inc. v. Enresco, Inc., 446 F.2d 1193, 1195 (10th Cir. 1971), cert. denied, 405 U.S. 922 (1972) (Rule 60(b) motion subject to abuse of discretion review standard).

I

The facts are more fully set out in White I, and we only briefly summarize here. White and Staponski were long-time GM employees terminated under GM's Special Incentive Separation Program (SISP). They each received approximately $60,000 cash and other benefits under the separation program. They were in the age group protected by the Age Discrimination in Employment Act (ADEA). At the time of their termination, however, they each signed a release discharging GM from all claims "known or unknown" based upon their

cessation of employment, including ADEA, the Civil Rights Act of 1964, and "any other federal, state, or local law, order, or regulation, or the common law relating to employment and any claims for breach of employment contract, either express or implied." I R. tab 10, exs. 2-A, 2-B. Allegedly White and Staponski thought they were among the GM employees singled out to be terminated because they had previously complained to management about defective brake work being done in their plant. White also thought that when he gave GM as an employment reference to Westlake Hardware, to which he was submitting a job application, GM reported that he was a "troublemaker." White and Staponski consulted lawyer Gwen G. Caranchini, and she filed suit on their behalf against GM.

An attorney's signature on the complaint or other pleading in a suit in federal court

constitutes a certificate

> "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Fed. R. Civ. P. 11. If there is a violation the court can sanction the lawyer, the client, or both. Id. These sanctions may include payment of the other party's "reasonable expenses incurred because of the filing...including a reasonable attorney's fee. " Id.

The portions of Rule 11 relevant to determining whether sanctions are justified in the instant case are its requirements of "reasonable inquiry" and "good faith argument."

at least an extension of existing law and its requirement that the filing was "not interposed for any improper purpose. Id.

The lawsuit plaintiffs filed made no ADEA claim. It was filed as a diversity case for wrongful discharge, breach of implied contract of employment, and slander under Kansas law. The original complaint made no mention of signed releases.

The district court found, as one basis for its award of sanctions, that although GM's lawyers advised attorney Caranchini of the releases, she never obtained copies before filing the complaint. 126 F.R.D. at 565. To Caranchini's allegation that she and her clients were unable to locate copies of the releases, the district court responded that a reasonable attorney would have waited to acquire them before filing suit, because there were no statue of limitations

problems. Id.

On the slander count, the complaint did not name the GM employee who allegedly committed the slander, nor the Westlake employee who allegedly asked for the reference. GM attorneys acquired the Westlake employee's name, obtained the employee's affidavit that she did not call GM for a reference on White, and then asked Caranchini to dismiss the claim. This the attorney refused to do despite having no other evidence to contradict the Westlake employee's affidavit. This led the district court to conclude that plaintiffs conducted no investigation of the slander claim, thereby violating the "reasonable inquiry" requirement of Rule 11. Id. at 566.

The court also found that plaintiffs violated the Rule 11 requirement that claims advanced must be warranted at least by a "good faith argument for the extension, modification, or reversal of

existing law," because plaintiffs' attorney insisted that "the court's application of the black letter law set out in Hastain[2] was in error," and "that whether a certain set of facts constitutes duress is a question of fact for the jury." Id. The court also found plaintiffs' argument that the releases were ambiguous to be "specious." Id. The fraud and unconscionability claims were found to be without merit but were not used as a basis for Rule 11 sanctions. Id.

The court also found violation of Rule 11 because the action was advanced for an improper purpose and because needlessly increased the cost of litigation. Plaintiffs had made prefiling

---

[2] The reference here is to Hastain v. Greenbaum, 205 Kan. 475, 482, 470 P.2d 741, 746 (1970), in which the court held that whether facts as alleged by a party are sufficient to constitute duress is a questions of law.

threats to contact the media and government agencies about the allegedly defective brake work being done at the plant if settlement demands were not met. As to this, the court stated the following:

> "In light of the fact that this court has found plaintiffs failed to make a reasonable inquiry into the facts in this case, and that plaintiffs pursued claims which were not warranted by existing law, the court finds that plaintiffs' threats to publicize those baseless claims and their subsequent filing of the lawsuit were improper and in violation of Rule 11."

Id. at 567. Additionally, the court found a Rule 11 violation in that "voluminous discovery requests" plaintiffs filed were unwarranted "since plaintiffs' claims were not well-founded in fact or in law." Id.

The court ordered "plaintiffs and their attorneys" to pay GM's costs and attorney's fees

in defending the entire case, as well as in its pursuit of sanctions. Id After GM filed an affidavit and exhibits detailing its expenses and attorney's fees incurred, the court rejected plaintiffs' motions to strike, for discovery, and For a hearing. It rejected plaintiffs' affidavits claiming that they were unable to pay any amount of sanctions, finding that they consisted of "bald assertions" that did not show what assets or income plaintiffs and their counsel had. III R. tab 145, at 2-3. It found the affidavit of GM's principal lawyer, which sought attorney's fees at an average hourly rate of $115.00, to be reasonable, and awarded all fees and expenses claimed, a total amount of $172,382.19. Id. at 3.

II

A. Objective Standard

As a preliminary matter, plaintiffs challenge

the district court's imposition of sanctions on the ground that the court applied a subjective rather than objective standard in evaluating plaintiffs' conduct. This circuit has adopted the view that an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions. Adamson v Bowen, 855 F.2d 668, 673 (10th Cir. 1988). A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances. Id. In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim. See Calloway v Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988) (focus on whether an

objectively reasonable basis for claim "was demonstrated"), rev'd in part on other grounds, 110 S. Ct. 456 (1989). Thus, plaintiffs may not shield their own incompetence by arguing that, while they failed to make a colorable argument, a competent attorney would have done so. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987) (Rule 11 intended to prevent abuses arising from bad faith, negligence, and to some extent, professional incompetence).

The district court recited the correct standard in its review of plaintiffs' conduct. It stated that "the court should evaluate the parties' actions under an objective standard. The standard, then, is one of reasonableness under the circumstances." 126 F.R.D. at 565. We conclude that the district court applied the proper standard and that its conclusion that

plaintiffs' actions in this case fell below the standard was not erroneous.

B. Specificity

In its opinion, the district court failed to specify each of the "pleadings, motions or other papers" for which it was imposing sanctions. See Fed. R. Civ. P. 11. Plaintiffs object to the lack of specificity. As noted, the court held plaintiffs responsible for all of GM's expenses and attorney's fees through its grant of summary judgment, thus apparently concluding that all of plaintiffs' actions were tainted by their failure to make reasonable inquiry or to make nonfrivolous arguments on the law, and by improper purpose. While the court's method of imposing sanctions was not optimal, neither was it an abuse of discretion. See Lupo v. R. Rowland & Co., 857 F.2d 482, 485-86 (8th Cir.

1988) (affirming district court award of sanctions based on "bulk of filings" and "conduct of litigation"), cert. denied, 109 S. Ct. 2101 (1989). The court's findings and conclusions, which we have extensively quoted, were detailed enough to "assist in appellate review ...[,] help assure the litigants...that the decision was the product of thoughtful deliberation, and...enhance [] the deterrent effect of the ruling." Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc) (quoting Schwarzer, Sanctions Under the New Federal Rule 11--A Closer Look, 104 F.R.D. 181, 199 (1985)).

III

We now turn to a review of the district court's particular findings.

A. Slander Claim

The district court properly granted summary

judgment against plaintiff White on his claim that he was slandered by GM personnel when he gave GM as a prior work reference in a job interview at Westlake Hardware. Plaintiffs refused to dismiss this cause of actions when confronted with an affidavit of the Westlake employee that she made no inquiry of GM, and plaintiffs had no evidence to contradict her affidavit. The court concluded that it was "inescapable" that plaintiffs' attorney "in fact conducted no investigation into whether anyone at Westlake Hardware had sought a reference from GM or whether any derogatory statement had been made concerning White." Id. at 566.

Under Kansas law a slander claim must set out in detail "the alleged words spoken or published, the names of those persons to whom they were spoken or published and the time and place of their publication." Schulze v. Coykendall, 218

Kan. 653, 545 P.2d, 392, 397 (1976). Plaintiffs, when they filed their complaint, evidenced neither general knowledge of the elements of slander, nor knowledge of the specifics of the alleged slander in this case.3 Failing to investigate the facts of a claim before filing a complaint is sanctionable and the district court did not abuse its discretion in so holding.4 Hilton Hotels Corp. v. Banov, 899 F. 2d

---

3 The affidavit of plaintiff White, filed in response to GM's motion for summary judgment, is informative on this issue. White's affidavit only states that he believed "some mention" in his conversation with Westlake Hardware personnel was made about him being a "troublemaker." II R. tab 44, Ex. A-47.

4. This is not, of course, a claim the details of which were uniquely and exclusively in the control of the defendant. Were that the case, we would not find plaintiffs' conduct sanctionable. See Danik, Inc. v. Hartmarx Corp., 875 F.2d 890, 896 (D.C. Cir. 1989), aff'd in part, rev'd in part sub nom. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990). In the instant case plaintiffs had access to Westlake Hardware

40, 41-44 (D.C. Cir. 1990).

B. Claims of Wrongful Discharge and Breach of Contract

The district court held that plaintiffs' claims for wrongful discharge and breach of contract were sanctionable because plaintiffs had executed valid releases at the time of their

---

personnel. Plaintiffs therefore should have ascertained the details of the allegedly slanderous communication before filing suit. In their reply brief plaintiffs assert Westlake employees would not talk to White or White's counsel before or after the suit was filed. Reply Brief of Appellants at 3-4. Plaintiffs assert that Westlake's counsel denied a request to speak to Westlake personnel unless through a deposition, but they do not indicate whether this request was before or after litigation commenced. Id. at 4. Before the district court, however, they only stated that White "would obviously be assisted in helping defeat the [GM] motion for

-Continued-

-Continued-

summary judgment if he could take the depositions of the various Westlake personnel referred to in his affidavit. Westlake will not agree to informal statements of its personnel, therefore depositions are necessary." I R. tab 34, at 18-19. In any event plaintiffs are not excused from meeting the pleading requirements of Kansas law.

termination. The court found that plaintiffs failed to reasonably inquire into the existence of the releases before filing suit in this case, that a reasonable inquiry would have revealed their existence, and that a reasonable attorney knowing of their existence would not have filed suit.

At least one circuit has held that failing to mention the existence of a release that could bar a claim is sanctionable under Rule 11. See Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914 (11th Cir. 1987). We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their claims, but because they failed to act reasonably given the results of their inquiries. In their pleadings, plaintiffs did occasionally question the existence or facial validity of the releases; however, they pleaded

in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.

Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1023-24 (1988). An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation. For instance, an otherwise time-barred claim may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period. The attorney's

argument must be nonfrivolous, however, she runs the risk of sanctions if her only response to an affirmative defense is unreasonable. See id. (if failure to make prefiling investigation is sanctionable so too is failure to disclose adverse results of investigation).

The court rejected plaintiffs' arguments that they had executed the releases under duress and found their arguments regarding Kansas law on duress so poorly framed and so negligently made as to be sanctionable. We Agree. Among the arguments made to the district court was that the Kansas Supreme Court case of Hastain v. Greenbaum, 205 Kan. 475, 470 P.2d 741 (1970), which is binding on this court, was distinguishable because the West Publishing Company classified it as a "Bills and Notes" case in formulating its Headnotes. III R. tab 125, at 17. The arguments that plaintiffs presented to

the district court were specious.[5]

The district court also sanctioned plaintiffs for alleging that the releases were void due to ambiguity. Plaintiffs point out that the exact duties of GM are not set out in the releases. But the releases clearly state that all present and future claims, known or unknown, were released by White and Staponski. Further, plaintiffs failed to allege any real confusion caused by any ambiguities in the releases. There is no substantial disagreement between the parties on the terms of the contract.

As we have discussed in White I, there were arguments to set aside the releases that could

---

[5] Furthermore, plaintiffs argued, in opposition to GM's motion for summary judgment, that the question of duress could not be decided as a matter of law in this case, while arguing in their own motion for partial summary judgment that the facts were sufficiently settled to entitle them to a judgment as a matter of law.

have been made that would not have warranted sanctions. A reasonably competent attorney could have filed a colorable, nonfrivolous ADEA case against GM. Although it would be more difficult, a nonfrivolous common law whistleblowing claim also might have been brought. Thus, we have the tragedy of inept lawyers who failed to investigate their claims, and who compounded the court's and the defendant's problems in dealing with the case by adopting an extremely aggressive approach. Rule 11 should not be used to discourage advocacy, including that which challenges existing law. Nevertheless, the court is entitled to expect a reasonable level of competence and care on the part of the attorneys who appear before it, and to expect that claims submitted for adjudication by those attorneys will have a rational basis. We cannot find the

district court's decision to award sanctions an abuse of discretion.[6]

C. Improper Purpose

The district court justified its decision to sanction the plaintiffs in part because of evidence of improper purpose, manifested by their threats against GM to utilize the media to create adverse publicity for GM and in their unwarranted discovery requests. In making this fact determination and in evaluating the improper purpose prohibition of Rule 11, it relied in part upon plaintiffs' failure to make reasonable inquiry and failure to make claims cognizable -

---

[6] Arguments presented by plaintiffs on appeal were clearer and more specific on the issue of economic duress. See White I. When we considered the appeal, we determined that while not ultimately persuasive, the arguments on appeal did not merit sanctions. The record reflects that practice improved plaintiffs' ability to make the argument.

under the law. We cannot find the court fact findings clearly erroneous or its decision to sanction an abuse of discretion.

IV

Plaintiffs argue that the amount of sanctions chosen by the trial court was excessive because it exceed the amount necessary to accomplish deterrence and because plaintiffs are absolutely incapable of paying such an amount. They urge that we vacate the sanction award and remand with directions. Although we express no view on the proper amount of sanctions, we agree that the award should be vacated and remanded for reconsideration in the light of the purposes and standards we set forth herein. In addition, we believe the trial court erred in not making specific findings on the degree of fault among the sanctioned plaintiffs to permit us to determine whether joint and several liability is

justified. .

A. Amount of Sanctions

Rule 11 sanctions are meant to serve several purposes, including (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management. See American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in, 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure 212, 235-36 (Supp. 1989) (hereinafter ABA Standards). Deterrence is, however, the primary goal of the sanctions. Cooter & Gell v. Hartmarz Corp., 110 S.Ct. 2447, 2454 (1990) ("It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus,...streamline the

administration and procedure of the federal courts."); see also Advisory Committee Note to Rule 11, 97 F.R.D. 198 (1983) (justifying amendments due to ineffectiveness of prior Rule 11 in "deterring abuses" and citing need to "discourage dilatory or abusive tactics"); Gaiardo, 835 F.2d at 483; Thomas, 836 F.2d at 881; Eastway Constr. Corp. V. City of New York, 637 F. Supp. 558, 564 (E.D.N.Y 1986) (citing cases), modified, 821 F.2d 121, (2d Cir.), cert. denied, 484 U.S. 918 (1987).

Although the rule specifically allows the award of attorney's fees to the opposing party as an appropriate sanction, the award of fees "is but one of several methods of achieving the various goals of Rule 11." Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988). The rule's mention of

attorney's fees does not create an entitlement to full compensation on the part of the opposing party every time a frivolous paper is filed. See, e.g., Thomas, 836 F.2d at 879 (noting that reasonable attorney's fees "does not necessarily mean actual expenses"); Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers, 855 F.2d 1080, 1091 (3d Cir. 1988) (same). Thus, although the monetary sanction imposed would normally be limited to the reasonable attorney's fees and expenses the opposing parties incur, the court must also consider other factors in arriving at "an appropriate sanction." Fed. R. Civ. P. 11. The appropriate sanction should be the least severe sanction adequate to deter and punish the plaintiff. Doering, 857 F.2d at 195-96; Cabell v. Petty, 810 F.2d 463, 466-67 (4th Cir. 1987).

We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:

1. Reasonableness (lodestar) calculation. Because the sanction is generally to pay the opposing party's "reasonable expenses...including a reasonable attorney's fee," Fed. R. Civ. P. 11, incurred because of the improper behavior, determination of this amount is the usual first step. The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses. Doering, 857 F.2d at 195. The injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims. E.g., Napier, 855 F.2d

at 1092-94; Thomas, 836 F.2d at 878-81. In evaluating the reasonableness of the fee request, the district court should consider that the very frivolousness of the claim is what justifies the sanctions. Indeed, it is difficult to imagine how GM could have reasonably incurred $172,382.19 attorney's fees and expenses in ridding itself of this frivolous suit on summary judgment. We recognize that plaintiffs' attorneys followed "scorched earth tactics," and launched the kind of paper blizzard that we have condemned elsewhere, see Glass v. Pfeffer, 849 F.2d 1261, 1266 (10th Cir. 1988). But the expenditure of 1263.88 attorneys' and 96.44 legal assistants' hours to defend this suit through summary judgment seems incredible. See III R. tab 135

ex. A.[7]

We note that 17.06 hours of attorney time is explicitly attributed to "Publicity/Media," which GM's principal lawyer declared "includes time spent responding to adverse publicity generated by plaintiffs," including client consultations and responding to media inquiries. Id. tab 135, Affid. of P.S. Kelly, Jr., at 10 & ex. A. Because Rule 11 limits sanctions to those arising out of an improperly filed " pleading, motion or other paper," the attorney's fees and costs should be only those that reasonably relate to actions taken through the court system. See Cooter & Gell, 110 S. Ct. at 2461 (limiting scope

---

[7] GM's brief itself notes that "the dispositive legal issues of release, duress, and slander are neither novel nor unsettled, and plaintiffs' claims run afoul of hornbook law." Brief of Appellee at 23.

of Rule 11 sanctions to filings in district court); Olivieri v. Thompson, 803 F.2d 1265 (2d Cir. 1986); Gaiardo, 835 F.2d at 484 (Rule 11 sanctions only apply in situations involving attorney's signing paper). On remand we direct the district court to reexamine GM's fee request using standards similar to those we set out in Ramos v. Lamm, 713 F.2d 546, 553-55 (10th Cir. 1983). However, we do not intend the examination of "reasonableness" to place any significant additional time burden upon the court or to require additional evidentiary hearings. See infra Part V.

2. Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly

inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. Doering, 857 F.2d at 196 & n.4 We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the "minimum that will serve to adequately deter the undesirable behavior." Id. at 194 (quoting Eastway, 637 F. Supp. at 565) (emphasis in Circuit opinion); see also Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901, 912-14 (1988) (stressing importance of optimal rather than maximum deterrence in the imposition of Rule 11 sanctions). Thus, the limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer. E.g., Doering, 857 F.2d

195-96.

3. Ability to pay. The offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct. Thomas, 836 F.2d at 881; Doering, 857 F.2d at 196. Because of their deterrent purpose, Rule 11 sanctions are analogous to punitive damages. It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages. Annotation, Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases, 35 A.L.R. 4th 441, 459-61 (1985) (citing cases); cf. Cotner v. Hopkins, 795 F.2d 900,903 (10th Cir 1986) (considering financial status of offender in evaluating effect of fine

imposed under Rule 11). Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status.

The district court attempted to consider the financial conditions of plaintiffs in making the award; plaintiffs submitted affidavits, however, stating that each would be forced into bankruptcy if the court imposed GM's requested attorney's fees "in whole or in part." We sympathize with the district Court's frustration on receiving such a general and unhelpful statement of plaintiffs' ability to pay sanctions. Nevertheless, because we remand anyway, we urge the district court to allow plaintiffs to

supplement the record in this regard on remand. See Calloway, 854 F.2d at 1478. We hold, however, that if the plaintiffs remain uncooperative on remand, the Court may ignor ability to pay in levying sanctions. We also hold that even if the plaintiffs prove they are totally impecunious the court may impost modest sanctions to deter future baseless filings.

4. Other factors. In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See ABA Standards at 236-37.

Because the trial court did not consider the

issue of what amount was the least necessary to deter future misconduct, we vacate the award of sanctions and remand for further consideration.

B. Joint and Several Liability.

There is an obvious conflict of interest between White and Staponski, on the one hand, and their counsel, on the other, on the issue of who should be liable for the sanctions imposed by the district court. The matter was not raised in plaintiffs' briefs; this may have resulted, however, from the very conflict to which we refer. An attorney in the circumstances before us who argues that her clients were ignorant of any wrongdoing in the filing of the papers leading to sanctions essentially argues that she should bear sole liability for those sanctions. We therefore raise this joint and several liability issue sua sponte. See Calloway, 854

F.2d at 1473-76.

Sanctions must be appropriate in the amount and levied upon the person responsible for the violation. Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985). We agree with those circuits that have expressed the view that the sanctioning of a party requires specific finding that the party was aware of the wrongdoing. Calloway, 854 F.2d at 1474-5; Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc). In the instant case, the trial court appears to have assessed joint and several liability without considering relative fault. This concerns us particularly because this case is one in which at least a colorable ADEA argument could have been made to advance White and Staponski's position; however, no colorable argument was made in fact. The

competence of counsel is, therefore, at issue. Excessive discovery requests, which were complained of in this case, also seem peculiarly the province of lawyers. Moreover, we cannot determine whether the court intended to impose liability upon both of the plaintiffs' attorneys, or only upon Caranchini. See supra note 1. Therefore, on remand the court should make more specific findings regarding who bears the fault for the various actions warranting sanctions.

V

Plaintiffs challenge the court's refusal to allow them a separate hearing on the issue of the amount of attorney's fees claims by GM. The plaintiffs' motion was not a request for a hearing on the imposition of sanctions vel non, rather it was for a hearing on the reasonableness of the attorneys' fees requested by GM. III R.

tab 141 at 5.

A party that is the target of a sanctions request has a due process right to "notice that such sanctions are being considered by the court and a subsequent opportunity to respond," before final judgment. Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987) (en banc) (motion for sanctions for frivolous appeal). However, Braley clearly held that an opportunity to be heard does not require an oral or evidentiary hearing on the issue. The opportunity to fully brief the issue is sufficient to satisfy due process requirements. Id. at 1515. This rule has been adopted in most other circuits and comports with the cautions of the advisory Committee Notes against generating satellite litigation on the issue of sanctions. Advisory Committee Note, 97

F.R.D. at 201. See Donaldson, 819 F.2d at 1560 n. 12 (citing cases permitting sanction decision without oral hearing).

We believe, however, that an adequate opportunity to respond to an attorney's fee request requires that the persons to be sanctioned be provided enough detail concerning the basis of the requested fees to permit an intelligent analysis. The affidavit upon which the court relied in this case was insufficient because, although it broke down the fees by total hours and rates per lawyer and by category, it did not permit plaintiffs to ascertain the reasonableness of GM's staffing decisions. III R. tab 135. For instance, we note that as many three attorneys or others represented GM at particular depositions. This information may seem burdensome to provide, but absent a hearing

in which cross-examination is possible, we do not see how plaintiffs could challenge the request except in general terms on the basis of the attorney fee information provided in the instant case. We hold, therefore, that a separate hearing is not necessary to accord plaintiffs due process, but on remand the court should insure that plaintiffs receive enough detail to respond intelligently in writing to the reasonableness of the requested fees.

VI

Plaintiffs allege that the trial court erred in denying their motion "for remand" pursuant to Fed. R. Civ. P. 60(b). Despite plaintiffs' inaccurate labeling, their motion was clearly one to set aside the summary judgment because of new evidence. The court rejected plaintiffs' proffer

of new evidence and denied their motion. We find no error in the court's decision.

The evidence presented by plaintiffs which they contend justifies vacating the summary judgment is a snippet of testimony by one of GM's attorneys, given in another case, in which the attorney characterized plaintiff White as "very upset over being forced to take the buy out." III R. tab 136, at 3. We agree with the district court that even if the given testimony reflects the attorney's view that plaintiff White acted under duress in accepting the buyout, it is irrelevant because the attorney is not charged with the responsibility of determining whether the circumstances constituted duress. That is an issue of law, which the court resolved correctly in accordance with Kansas law. Thus, the new evidence does not merit modification of the summary judgment.

We AFFIRM the district court's denial of plaintiffs' Rule 60(b) motion and its determination that sanctions are proper in the instant case. We VACATE the particular award which the district court made and REMAND for further proceedings consistent with this opinion.

APPENDIX G

Memorandum and Order of the United States Court for the District of Kansas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FREDERICK LAWRENCE WHITE, JR. and BENJAMIN L. STAPONSKI, JR.,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

No. 88-2053-S

Memorandum & Order
Filed June 30, 1989

This matter is before the court on defendant's application for attorneys' fees and expenses, plaintiffs' motion to strike that application and for discovery and a hearing, plaintiffs' "motion for remand," and defendant's supplemental motion for sanctions in response to the "motion for remand."

On April 10, 1989, this court entered a Memorandum and Order which granted defendant's

request for Rule 11 sanctions against plaintiffs and their counsel. Defendant has now submitted an affidavit and exhibits detailing the attorneys' fees and expenses it claims it incurred in defending this lawsuit. Plaintiffs have moved to strike that application and they ask for discovery regarding the reasonableness of defendant's requested fees. They also ask for a hearing on the request for attorneys' fees. Further, plaintiffs filed a "motion for remand", asking this court to set aside its previous order of summary judgment in light of "new evidence" they claim they have discovered. Defendant seeks sanctions against plaintiffs, contending the "motion to remand" is without basis in fact or law.

The court has reviewed plaintiffs' objections to defendant's application for attorneys' fees and expenses and those objections are rejected.

Although it is probably preferable for attorneys to itemize their time by delineating the work done each day, defendant's counsel's method of itemizing their work by type of work is sufficient in this case. The court has reviewed the hours spend by each attorney for court appearances, discovery, investigation, motions and responses, publicity and media work, research, and work on sanctions and finds the hours spent to be reasonable. This conclusion is based in part on the fact that this court is intimately acquainted with the flurry of activity that took place in this case in the immediate weeks after plaintiffs filed their complaint.

The court further finds that defendant and its counsel did make some effort to resolve this case before it was filed and to limit discovery upon

the filing of the case. For whatever reason, defendant was unable to do so. However, it appears that defendant did at least make some effort to avoid incurring the attorneys' fees asked for now, and its fee award will not be reduced because of its failure to prevent the accumulation of those expenses.

Plaintiffs and their counsel also contend that the entire amount of attorneys' fees and expenses should not be assessed against them because they are unable to pay those fees and costs. They have submitted affidavits to the court, stating that they are unable to pay. However, they do not show the court any evidence which would support their bald assertions; they do not show the court what assets, if any, they have available to satisfy any award of fees and costs and counsel does not even indicate to the court her income from her law practice. Their

unsupported contentions are insufficient to justify a reduction in an award of fees and expenses.

The court also denies plaintiffs and their counsel's request to audit General Motor Corporation's counsel's records and/or to conduct a hearing on the reasonableness of the fees requested. The case law does not support their request for an audit. Further, the court is aware of the average hourly rates of attorneys in this city. Gage & Tucker's average hourly rate in this case of $115.00 is not unreasonable. The court will grant defendant's request for attorneys' fees and costs in the amount of $172,382.19.

Plaintiffs have also filed a "motion for remand" pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) allows the court to set aside a final judgment because of

newly discovered evidence or fraud. Plaintiffs point to testimony given by General Motors' lead counsel, Paul Scott Kelly, in an unrelated case in the United States District Court of the Western District of Missouri. General Motors was a defendant in that case as well, and the plaintiff was represented by Ms. Caranchini. Plaintiff Frederick Lawrence White, Jr. had given a deposition in that unrelated case. Mr. Kelly was questioned about Mr. White, Jr.'s testimony in his deposition. Mr. Kelly characterized Mr. White, Jr.'s testimony as "attempt[ing] to unload on the company." Mr. Kelly went on to state that Mr. White, Jr. "was obviously very upset over being forced to take the buy-out indicated." Plaintiffs jump on this statement by Mr. Kelly, stating that it is new evidence that General Motors knew Mr. White, Jr. had signed his release

under duress. General Motors responds by arguing that Mr. Kelly was only attempting to characterize Mr. White, Jr.'s testimony and was not stating an option as to whether Mr. White, Jr. signed the release under duress.

Even if the court were to interpret Mr. Kelly's testimony as plaintiffs urge, that testimony would not constitute new evidence. Mr. Kelly's opinion as to whether the releases were signed under duress is not relevant; Mr. Kelly is not the one to decide whether the releases were signed under duress. Rather, that decision is solely for the court. In its Memorandum and Order of September 30, 1988, the court found that as a matter of law, plaintiffs had failed to show evidence which would indicate they had signed the releases under duress. White v. General Motors Corp., 699 F. Supp. 1485, 1487 (D. Kan. 1988).

Plaintiffs were given the choice of taking the severance pay and signing the releases or refusing the severance pay and being discharged. They had approximately two weeks in which to decide their course of action, and they did make some attempt to contact attorneys within that two week period. Id. The court determined that under those facts there was no duress under Kansas law. Id. Plaintiffs' motion for remand will be denied.

Defendant has asked for Rule 11 sanctions against plaintiffs, contending that plaintiffs' motion for remand was without basis in law or fact. While the motion for remand was without merit, the court refuses to find that it was so frivolous as to justify Rule 11 sanctions. In any event, the full award of attorneys' fees originally requested by defendant should be sufficient to deter plaintiffs and counsel from

future violations of Rule 11.

IT IS BY THE COURT THEREFORE ORDERED that defendant's application for attorneys' fees and expenses is granted. The court assesses defendant's attorneys' fees and expenses against plaintiffs and their attorney, jointly and severally, in the amount of One hundred Seventy Two Thousand, Three Hundred Eighty-Two Dollars and Nineteen Cents ($172,382.19). IT IS FURTHER ORDERED that plaintiffs' motion to strike, motion for discovery, and request for hearing are denied. IT IS FURTHER ORDERED that Plaintiffs' motion for removal is denied. IT IS FURTHER ORDERED that defendant's supplemental motion for sanctions is denied.

DATED: This 30th Day of June 1989, at Kansas City, Kansas.

S/S
DALE E. SAFFELS
United States District Judge

APPENDIX H

Memorandum and Order of the United States Court for the District of Kansas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FREDERICK LAWRENCE WHITE, JR. and BENJAMIN L. STAPONSKI, JR., No. 88-2053-S

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

Memorandum & Order
Filed April 10, 1989

This matter is before the court on defendant's motion for sanctions. On September 30, 1988, this court granted defendant's motion for summary judgment in this case. See White v. General Motors Corp., Inc., 699 F. Supp. 1485 (D. Kan. 1988). The court found that plaintiffs had released defendant from all liability arising out of their alleged "whistleblowing" activities.

The court further found that the releases signed by plaintiff could not be invalidated on the basis of fraud, because plaintiffs failed to plead fraud with specificity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court also rejected plaintiffs' contentions that the terms of the releases were ambiguous and that the releases should be void as against public policy. Further, the court found there was no evidence to support plaintiff Frederick Lawrence White, Jr.'s ("White") slander claim. Defendant now seeks sanctions under Rule 11 of the Federal Rules of Civil Procedure, contending that plaintiffs and their attorneys failed to make a reasonable inquiry into the relevant facts and into the applicable law, that they brought this litigation for an improper purpose, and they unduly multiplied the cost of these proceedings with burdensome discovery requests.

Rule 11 of the Federal Rules of Civil Procedure provides that in signing a pleading, an attorney or party certifies that after "reasonable inquiry", the signer has formed the belief that the matter asserted in the pleading:

> [I]s well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A pleading signed in violation of Rule 11 subjects the signer to sanctions, which can include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney's fees. The imposition of sanctions is mandatory if a violation of Rule 11 is established. See Adamson v. Bowen, 855 F.2d 668, 672 (10th Cir. 1988); Burkhart v. Kinsley

Bank, 852 F.2d 512, 515 (10th Cir. 1988). A finding of subjective bad faith is not required in order to impose Rule 11 sanctions; rather, the court should evaluate the parties' actions under an objective standard. The standard, then, is one of reasonableness under the circumstances. Burkhart v. Kinsley Bank, 804 F.2d 588, 589 (10th Cir. 1986).

The court will first address defendant's contention that plaintiffs and their attorneys failed to make a reasonable inquiry into the relevant facts in this case. The uncontroverted facts presented to the court on summary judgment showed that both plaintiffs had executed documents entitled "Statement of Acceptance of Special Incentive Separation." Those document provided that in return for severance pay, plaintiffs released General Motors Corporation ("GMC"):

> [F]rom all claims, demands, and causes of action, known or unknown, which [they] may have [had] based on the cessation of [their] employment at General Motors. [The] release specifically include[d] ... any ... federal, state, or local law, order, or regulation, or the common law relating to employment and any claims for breach of employment contract either express of implied.

White, 699 F. Supp. 1486.

The uncontroverted facts further showed that the plaintiffs signed the releases after considering them for approximately two weeks. The original complaint in this case made no mention of signed releases. However, defendant now shows the court that prior to the time plaintiffs' attorneys filed the complaints, defendant's attorneys advised them that plaintiffs had signed releases and that General Motors ("GM") was thus not liable for their alleged wrongful discharge. Plaintiffs' attorneys did not obtain copies of those releases

before filing the complaint. Instead, it appears that plaintiffs' attorneys proceeded to file the complaint as if no releases existed, despite the fact that they had been put on notice of their existence. Further, it does not appear that plaintiffs' attorneys even attempted to obtain copies of the releases.

Rule 11 provides that in signing a pleading, an attorney certifies that to her "knowledge, information and belief formed after reasonable inquiry," the matter asserted in the pleading is "well grounded in fact." The court finds that plaintiffs' attorneys failed to meet the requirements of Rule 11 because they failed to conduct a reasonable inquiry and obtain a copy of the releases before they filed the complaint. They were put on notice before the complaint was filed that those releases did exist; they were under no time constraints brought on by the

running of the statute of limitations or otherwise which would have prevented them from taking the reasonable step of at least reviewing the releases to determine whether they were enforceable. Plaintiffs' attorneys state that they were, at first, unable to locate a copy of the releases. However, under the circumstances, a reasonable attorney would have waited until she obtained those releases before going ahead with the filing of the complaint

Defendant raises a second issue regarding plaintiffs' and their attorneys' failure to make a reasonable inquiry into the relevant facts. In his slander claim, plaintiff White had contended that he had applied for a job with Westlake Hardware. He stated that this employer had contacted GM and that someone at GM had told his prospective employer White was a "troublemaker."

White, 699 F. Supp. at 1486. In his complaint, he did not state the name of the person at GM who allegedly made the statement, nor did he give the name of the person at Westlake Hardware who had asked for the reference. Defendant now shows the court that after an exchange of letters between the attorneys, plaintiffs' attorneys gave GM's attorneys the name of the person at Westlake Hardware who allegedly called GM for the reference on White. GM's attorneys contacted this person immediately, and that person stated in an affidavit that she did not call GM for a reference on White. Id. at 1489. Plaintiff White had no other evidence to contradict her affidavit. After GM obtained the affidavit, counsel for GM contacted plaintiffs' attorneys and ask that they dismiss the slander claim. They refused to do so, and instead continued to

assert it in their briefing on the summary judgment motion.

The court finds that plaintiffs' and their attorneys' insistence on pursuing the slander claim without a "reasonable inquiry" into whether it was "well grounded in fact" constitutes another violation of Rule 11. The court is left with the inescapable conclusion that plaintiffs' attorney in fact conducted no investigation into whether anyone at Westlake Hardware had sought a reference from GM or whether any derogatory statements had been made concerning White.

Defendant next contends that plaintiffs' and their attorneys violated Rule 11 of the Federal Rules of Civil Procedure by advancing their claims without a belief that the claims were "warranted by existing law or a good faith argument for the extension, modification, or

reversal of existing law." Defendant argues that under Kansas law, the issue of whether a certain set of facts constitutes duress is initially a question of law. Indeed, this court found this was the established law in this jurisdiction. See id. at 1487 (citing Hastain v. Greenbaum, 205 Kan. 475, 482, 470 P.2d 741, 746 (1970)). Plaintiffs' attorneys contend that the court's application of the black letter law set out in Hastain was in error. In fact, plaintiffs' attorneys attempt to distinguish the facts in Hastain from those in this case, and place great weight on the fact that unlike the instant case, Hastain was a case involving an obligation on a note. However, the argument set out by plaintiffs is specious, for it presents a distinction without a difference. Kansas law is well-established that under any fact scenario,

the question of whether a certain set of facts constitutes duress is an issue for the court to decide. See, e.g., Jones v. Prickett, 135 Kan. 640, 644, 11 P.2d 1008, 1010 (1932); Western Paving Co. v. Sifers, 126 Kan. 460, 463-64, 268 P.2d 803, 805 (1928). Plaintiffs' contention that whether a certain set of facts constitutes duress is an issue for the jury is not well-founded. Plaintiffs and their attorney violated Rule 11 by continuing to insist that their position was supported by existing law, and sanctions are in order.

Plaintiffs also sought to void the releases in question on the grounds that they were unconscionable, ambiguous, and were procured through fraud. The court rejected each of these contentions in its Memorandum and Order of September 30, 1988. See White, 699 F. Supp. at 1487-88. The court rejected plaintiffs'

unconscionability argument since under Kansas law, absent fraud or duress, the court may not inquire into the fairness of the agreement between the parties. Id. at 1488 (citing International Motor Rebuilding Co. v. United Motor Exchange, Inc., 193 Kan. 497, 501, 393 P.2d 992, 996 (1964)). The court also found plaintiffs' ambiguity argument was specious; they had contended that the release was unclear as to whether unknown claims or those arising at the time the releases were signed were also included within the scope of the release. The language in the release plainly stated that unknown claims based on the cessation of plaintiffs' employment were discharged by the release. White, 699 F. Supp. at 1488. Finally, the court found that plaintiffs' fraud claim was without merit because they failed to plead fraud with any degree of

specificity as required by Rule 9(b) of the Federal Rules of Civil Procedure. The court finds the contention that the releases were ambiguous was not well-founded in fact or in existing law and therefore violated Rule 11. However, since the court's rejection of plaintiffs' fraud claim was based simply on the form of pleading, that claim did not in and of itself violate Rule 11. Further, since the court rejected the fraud claim, it also refused to inquire into the unconscionability issue, and the court will not find that plaintiffs and their attorneys violated Rule 11 by pleading unconscionability.

Finally, defendant contends that plaintiffs violated Rule 11 by advancing their action for an improper purpose and needlessly increasing the cost of litigation. Rule 11 provides that by

signing a pleading, the signer certifies that the pleading is "not interposed for any improper purpose," or "to cause unnecessary delay or needless increase in the cost of litigation." Defendant refers to plaintiffs' attorneys' statements in correspondence with defendant before the case was filed, threatening not only to file the suit if a settlement could not be reached, but also threatening to contact the media and governmental agencies concerning their charges that they had been fired for "whistleblowing." In response, plaintiffs do not deny that they threatened to contact the media and create adverse publicity for defendant if their settlement demands were not met. In light of the fact that this court has found plaintiffs failed to make a reasonable inquiry into the facts in this case, and that plaintiffs pursued

claims which were not warranted by existing law, the court finds that plaintiffs' threats to publicize those baseless claims and their subsequent filing of the lawsuit were improper and in violation of Rule 11. Finally, the court would simply note that the voluminous discovery requests filed by plaintiffs in this case were unwarranted since plaintiffs' claims were not well-founded in fact or in law. Again, plaintiffs and their attorney were in violation of Rule 11.

Since the court has found numerous violations of Rule 11 of the Federal Rules of Civil Procedure in the prosecution of this action, sanctions are in order. The court especially notes that total failure of plaintiffs' counsel to investigate the facts in support of the claims and their refusal to acknowledge well-established

law in this jurisdiction. Because of those egregious violations of Rule 11, in addition to those other violations noted by the court in this Memorandum and Order, plaintiffs and their attorneys shall be ordered to pay defendant's costs and attorneys' fees incurred in defending this case. The costs and fees shall include any incurred in pursuing the motion for sanctions. Defendant's attorneys shall file an affidavit within ten (10) days from the date of this Memorandum and Order, setting out those costs and fees in detail. Plaintiffs' attorneys' may have ten (10) days to respond to defendant's statement, and defendant will then have five (5) days to reply.

IT IS BY THE COURT THEREFORE ORDERED that defendant's motion for sanctions is granted. Defendant shall file an affidavit detailing its

costs and attorneys' fees incurred in defending this action within ten (10) days from the date of this Memorandum and Order.

DATED: This 10th day of April, 1989, at Kansas City, Kansas.

S/S
DALE E. SAFFELS
United States District Judge

APPENDIX I

Memorandum and Order of the United States Court for the District of Kansas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FREDERICK LAWRENCE WHITE, JR. and BENJAMIN L. STAPONSKI, JR., No. 88-2053-S

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

Filed September 30, 1988
Memorandum & Order

Several matters are pending before the court in the above-captioned case. Defendant has filed a motion to dismiss and for summary judgment, and plaintiffs have filed a motion for partial summary judgment. Defendant responded to plaintiffs' motion by moving for a separate trial on the issue of release and for a stay of plaintiffs' motion for summary judgment on issues other than release. Plaintiffs also seek to

amend Count I of their complaint.

Frederick Lawrence White, Jr. ("White") and Benjamin L. Staponski, Jr. ("Staponski") claim that they were constructively discharged from their employment with defendant General Motors Corporation ("GM") for their "whistleblowing" activities, and that defendant breached an implied contract of employment. Plaintiff White also sues defendant for slander arising out of alleged statements made by defendant's representatives in giving an employment reference.

Defendant seeks dismissal and/or summary judgment on the grounds that by written agreement, plaintiffs released all possible claims they may have had against defendant. In the alternative, defendant requests that if summary judgment is not granted in their favor on the

release issue, the remainder of the proceedings should be stayed pending a resolution of this issue. Defendant seeks summary judgment on the slander claim on the grounds that there is a total lack of evidence to support White's assertion that the allegedly slanderous statement was made. Plaintiffs seek summary judgment in their favor, not only on the release issue, but on other factual issues regarding their "whistleblowing" activity.

The uncontroverted facts for the purposes of this motion are as follows. Prior to May 28, 1987, plaintiffs White and Staponski were salaried employees of defendant GM. On that date, they executed documents entitled "Statement of Acceptance of Special Incentive Separation."*

---

* The court rejects plaintiffs' bald assertions that they did not in fact execute the releases in question. Defendant has shown the court signed copies of those releases, and plaintiffs have failed to show the court any evidence which might

Those documents provided that in return for certain consideration, they released GM "from all claims, demands, and causes of action, known or unknown, which [they] may have [had] based on the cessation of [their] employment at General Motors. [The] release specifically include[d] ... any ... federal, state, or local law, order, or regulation, or the common law relating to employment and any claims for breach of employment contract, either express or implied." Approximately two weeks before the releases were executed, GM management advised plaintiffs that they would be "offered" the opportunity to sign the separation agreements. Plaintiffs allege that GM provided them two alternative courses of

---

establish the signatures were falsified or the copies altered. Plaintiffs' mere denials are simply not sufficient to defeat a summary judgment motion.

action: they could sign the releases or they would be fired. After two weeks, both plaintiffs signed the releases. Defendant now pleads those releases as an affirmative defense to plaintiffs' charges of wrongful discharge and breach of implied contract.

In support of his slander claim, plaintiff White claims he was defamed by GM management when a prospective employer, Westlake Hardware, allegedly called for an employment reference. White offers his affidavit showing that a personnel official at Westlake Hardware told him that someone at GM had told her White was a "troublemaker."

A moving party is entitled to summary judgment only when the evidence indicated that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); Maughan v. SW Servicing, Inc., 758 F.2d

1381, 1387 (10th Cir. 1985). An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. Thus, the more existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir 1986). The court must also consider the record in the light most favorable to the party opposing the motion. Bee v.

Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985). The language of Rule 56(a) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The court will first address defendant's argument that plaintiffs' releases bar them from bringing this aciton for wrongful discharge and breach of implied contract. The existence of a release may be pled as an affirmative defense, and the defendant has the burden of proof in establishing its existence. Tabor v. Lederer, 205 Kan. 746, 748, 472 P.2d 209, 211 (1970). The law generally favors the compromise of disputes,

and the courts will uphold a release's validity if it is not procured by fraud or bad faith. Fieser v. Stinnett, 212 Kan. 26, 31, 509 P.2d 1156, 1159-60 (1973). Once the party claiming the existence of a release meets it burden of proof, the burden shifts to the other party to show fraud, duress, or bad faith. Libel v. Libel, 5 Kan. App. 2d 367, 368, 616 P.2d 306, 308 (1980).

Plaintiffs argue that they signed the releases under duress, in that GM threatened they would be fired if they refused to sign the releases. In order to establish duress, a party must show: 1) the other party intended to coerce him, 2) the other party had as an objective the securing of an undue advantage over him, 3) the action taken by the other party was of a character adapted to

overcome his will and was reasonably adequate to accomplish that purpose, 4) the action taken must have in fact deprived him of his free will, and 5) the action must have caused him to act to his detriment. Libel v. Libel, id.; Motor Equipment Co. v. McLaughlin, 156 Kan. 258, 133 P.2d 149, 155 (1943). Whether a set of facts are sufficient to constitute duress if proven is a question of law. Hastain v. Greenbaum, 205 Kan. 475, 482, 470, P.2d 741, 746 (1970). This court must therefore examine whether GM's alleged threats of termination would be sufficient to constitute duress if proven to be true.

The court concludes that the facts presented would not be sufficient to constitute duress. While plaintiffs were presented with two undesirable choices, this fact alone is not

sufficient to constitute duress. Instead, the threats made must be so great as to overcome a person's will. Plaintiffs here did not have to sign the releases; they could have chosen to allow GM to fire them without severance pay, and then pursued GM in court for wrongful discharge and/or breach of implied contract. They did not select this alternative. After two weeks' reflection and at least some attempt to contact attorneys, they chose to take GM's offer of severance pay in return for their releases. While a court may not agree that plaintiffs chose the wisest or fairest coure, it was plaintiffs' choice to make. The court rejects plaintiffs' duress argument.

Plaintiffs also claim the releases should be invalidated because of fraud. However, as defendant points out, plaintiffs fail to state

with any particularity what facts might support this claim. Instead, they engage in an extended discussion of the law concerning fraud, but they never tell the court what GM allegedly did that constituted fraud. Frankly, the court is at a loss as to what plaintiffs are claiming. Anderson and Celotex Corp. require that in order to defeat a motion for summary judgment, plaintiffs must show the court the existence of some evidence which would create a genuine issue of fact and therefore make summary judgment inappropriate. In their response, plaintiffs have wholly failed to show the court any facts which if proven would support a claim of fraud. A general claim of fraud and a discourse on the applicable law is completely insufficient. Therefore, plaintiffs' fraud argument is rejected.

Since the court has rejected plaintiffs' fraud and duress claims, it will not be necessary for the court to address defendant's argument that the plaintiffs ratified the releases by continuing to accept the benefits of the agreements after learning of the alleged fraud and/or after the alleged duress was removed. Likewise, plaintiffs' argument that the consideration GM gave for the releases was inadequate can be summarily disposed of. Kansas law provides that absent evidence of fraud or duress, a court shall not inquire into the adequacy of the consideration given. International Motor Rebuilding Co. v. United Motor Exchange, Inc., 193 Kan. 497, 501, 393 P.2d 992, 996 (1964). Since the court has determined that no fraud or duress existed, plaintiffs' inadequacy of consideration argument can also be

rejected.

The court also rejects plaintiffs' related argument that GM failed to pay a portion of the consideration promised. They argue that because they have not received all payments promised (allegedly some medical benefits and career counseling), the releases should not be enforced. Kansas law provides that partial failure of consideration does not invalidate a contract and does not relieve a party of the duty to perform. Kohn v. Babb, 204 Kan. 245, 251, 461 P.2d 775, 780 (1969). Plaintiffs' contention is rejected.

Plaintiffs also make an argument that the releases should be voided because their terms are ambiguous. They claim that this ambiguity lies in the release's failure to specify whether unknown claims or those arising at the time the releases were signed are included within the

scope of the release. This argument is specious. The release plainly provides that plaintiffs "release[d] and discharge[d] General Motors ... from all claims, demands, and causes of action, known or unknown, which [they] may have [had] based on the cessation of [their] employment at General Motors." (Emphasis added.) The court has difficulty envisioning language that would be clearer. Plaintiffs released both known and unknown claims, and they released all claims arising out of their termination. Plaintiffs' argument is without merit.

Plaintiffs also claim the releases should be void as against public policy, because they seek to absolve a party from liability for an intentional tort (i.e.) wrongful discharge). All authorities cited by plaintiffs address the enforceability of exculpatory clauses which

operate prospectively. The court is aware of no authority in Kansas or elsewhere which would void the release of past intentional torts on public policy grounds. In fact, the law of Kansas favors the settlement of past claims, whether they are based on intentional or negligent action. Fieser v. Stinnett, 212 Kan. at 31, 509 P.2d at 1160. Therefore, even if the tort of wrongful discharge can be termed an "intentional tort", the settlement of such a claim cannot be deemed void as against public policy, and plaintiffs' argument fails.

Finding no grounds sufficient to void the release in question, the court will grant dismissal and/or summary judgment on Counts I and II.

Finally, the court will address White's slander claim. He bases his claim on his

assertion that someone at GM gave him a bad employment reference; he alleges that a GM official told a representative of Westlake Hardware that he was a "troublemaker." Even if such a

statement were to constitute slander, plaintiff has failed to meet his burden in the face of a summary judgment. He has shown the court no facts which would support his assertion. Defendant, on the other hand, shows the court that it has investigated the claim and can find no one to substantiate it. No one at GM admits to making the statement, and more importantly, the representative of Westlake Hardware to whom the statement was allegedly made says in her affidavit that she did not call GM for a reference on White. Plaintiff responds that this same representative of Westlake Hardware told him

that someone at GM said he was a "troublemaker." White's statement is of no value because it is plainly hearsay. Since this is the only "evidence" plaintiff has to offer in the face of a summary judgment motion, the motion must be granted.

For all of these reasons, defendant's motion to dismiss and for summary judgment will be granted, and plaintiffs' motion for partial summary judgment will be denied. Additionally, defendant's motion for separate trial on the issue of release and for stay of plaintiffs' motion for summary judgment on issues other than the release will be denied at moot. Finally, plaintiffs' motion for leave to amend Count I, which simply seeks to amend the "whistleblowing" claim to conform to recent Kansas law, will be denied as moot.

IT IS BY THE COURT THEREFORE ORDERED that defendant's motion to dismiss and for summary judgment is granted. IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment is denied. IT IS FURTHER ORDERED that defendant's motion for separate trial on the issue of release and for stay of plaintiffs' motion for summary judgement on issues other than release is denied as moot. IT IS FURTHER ORDERED that plaintiffs' motion for leave to amend Count I is denied as moot.

DATED: This 30th day of September, 1988, at Kansas City, Kansas

S/S_____
DALE E. SAFFELS
United States District Judge

APPENDIX J

RULE 56

SUMMARY JUDGMENT

RULE 56
SUMMARY JUDGMENT

* * *

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, who that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

APPENDIX K

RULE 11

SIGNING OF PLEADINGS, MOTION, AND OTHER PAPERS; SANCTIONS

RULE 11
SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A Party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or

parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.